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R E P O R T S

OF

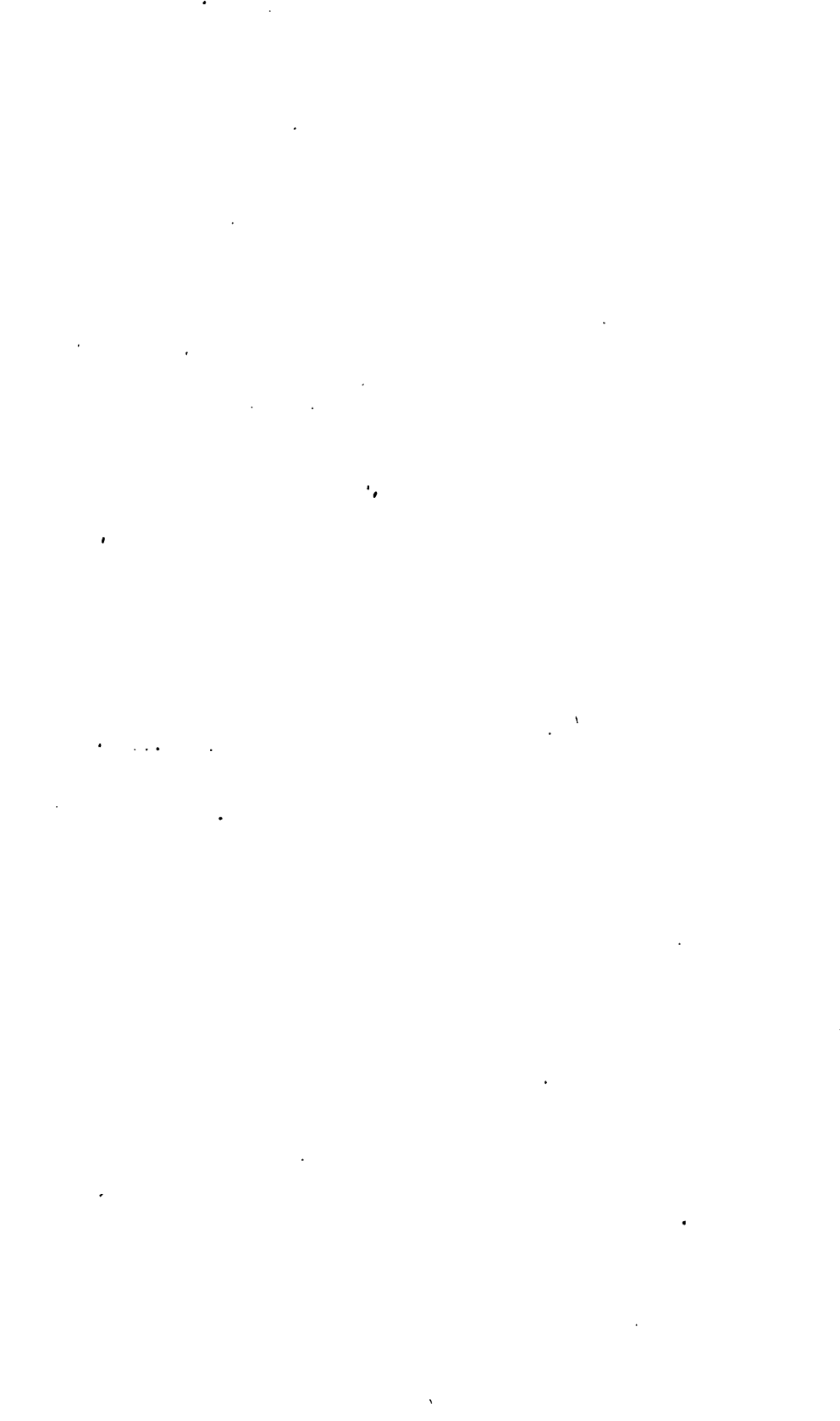
C A S E S

ARGUED AND DETERMINED

IN

The Court of King's Bench

VOL. IX.



R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN
The Court of King's Bench.

**WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.**

BY
RICHARD VAUGHAN BARNEWALL, OF LINCOLN'S INN,
AND
CRESSWELL CRESSWELL, OF THE INNER TEMPLE, ESQRS.
BARRISTERS AT LAW.

V O L. IX.
Containing the Cases of HILARY, EASTER, and TRINITY Terms, in
the 9th and 10th Years of GEORGE IV. 1829.

LONDON:
PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;
FOR SAUNDERS AND BENNING,
(SUCCESSORS TO J. BUTTERWORTH AND SON,)
43. FLEET-STREET.
1830.

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J U D G E S
OF THE
COURT OF KING'S BENCH,

During the Period of these REPORTS.

CHARLES LORD TENTERDEN, C. J.
Sir JOHN BAYLEY, Knt.
Sir JOSEPH LITTLEDALE, Knt.
Sir JAMES PARKE, Knt.

ATTORNEYS-GENERAL.

Sir CHARLES WETHERELL, Knt.
Sir JAMES SCARLETT, Knt.

SOLICITORS-GENERAL.

Sir NICHOLAS C. TINDAL, Knt.
Sir EDWARD BURTENSHAW SUGDEN, Knt.



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ARGUED AND DETERMINED

1829.

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Ninth and Tenth Years of the Reign of
GEORGE IV.

The KING *against* The Mayor and Aldermen of
the City of LONDON.

MANDAMUS to the defendants to admit and swear *Henry Winchester* into the place and office of alderman of the ward of *Vintry*, in the city of *London*.

To a mandamus to the lord mayor and aldermen of London to admit and

swear in *A. B.* to the office of alderman, they returned certain proceedings towards an election at a wardmote court, when *A. B.* was declared to be elected, and a return thereof made to the court of lord mayor and aldermen, and that that court has had from time immemorial cognizance and jurisdiction to enquire into and adjudicate upon all elections at wardmote courts to city offices, upon the petition of any party interested; that petitions, by several parties interested, were presented against the return of *A. B.*; that the merits were enquired into, and the election declared null and void by the said court of lord mayor and aldermen; and that *A. B.* was not duly elected, wherefore, &c. Traverse of the allegation, that *A. B.* was not duly elected. At the trial of the issue, it appeared, that at first, the lord mayor appointed three clerks to take the poll; but on the second day, he dismissed two of them. After the number of votes was declared, a scrutiny was demanded, and granted, and then the lord mayor dismissed the suitors at the wardmote, "to meet again upon a fresh summons." After this the lord mayor went out of office, and his successor issued a fresh summons for holding a wardmote, and there took the scrutiny, and declared *A. B.* duly elected, which was returned to the court of lord mayor and aldermen; who, upon petitions being presented, declared the election void, as stated in the return. Upon a special case, stating these facts; it was held, first, that the return was good in form; secondly, that the custom set out for the lord mayor and aldermen to enquire into and adjudicate upon elections, did not oust the jurisdiction of this court; thirdly, that the election was not invalid on account of the dismissal of two of the poll-clerks, or the change of the presiding officer; lastly, that the wardmote court was not dissolved, but only adjourned, by the dismissal of the suitors to meet again on a fresh summons.

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against
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LONDON.

The mayor and aldermen of the city of *London* returned the writ as follows; (that is to say,) The execution of this writ appears in the schedule annexed. The answer of the mayor and aldermen within mentioned. *A. Brown*, mayor. *R. C. Glynn*, &c. We, the mayor and aldermen of the city of *London*, mentioned in the writ hereto annexed, whose names are hereunto subscribed, do humbly certify and return to our sovereign lord the king, in the court of our said lord the king, before the king himself at *Westminster*, at the time in the said writ mentioned, that the city of *London* is, and from time whereof the memory of man is not to the contrary, hath been an ancient city, and that the citizens and freemen of the said city during all that time have been a body corporate and politic in deed, fact, and name, by divers names of incorporation, and that they are now a body politic and corporate by the name of the "mayor and commonalty and citizens of the city of *London*;" and that within the said city from time whereof the memory of man is not to the contrary, there of right have been, and still are divers wards, and amongst others the said ward of *Vintry* in the said writ mentioned, and divers citizens and freemen of the said city, who have been and have been called aldermen of the said city; and that the office of an alderman of the said city for and during all the time aforesaid hath been and still is a public office, and an office of great trust and pre-eminence within the said city, touching the rule and government thereof; and we the mayor and aldermen do further humbly certify and return, that from time whereof, &c. there of right hath been, and still of right ought to be within the said city, a certain court of record called the court of mayor and aldermen of the said city of *London*,
holden

holden in the *Guildhall* of and within the said city, according to the custom of the said city, before the mayor of the said city for the time being, or his locum tenens, and the aldermen thereof, or at least twelve others of the said aldermen, at such times as hath seemed meet and necessary to the mayor of the said city for the time being, upon due notice previously given thereof, according to the custom of the said city, for (amongst other things) the consulting about and transacting lawful and necessary affairs concerning the good government of the said city. And we, the said mayor and aldermen, do further humbly certify and return that from time whereof, &c. certain assemblies or courts, called wardmote courts, have been of right holden from time to time on divers days in each of the said wards within the said city respectively, for (amongst other things) the election of divers persons into divers offices and places in the said city, by virtue of precepts issued for such elections respectively; to which respective precepts returns during all that time have been made, and of right ought to have been made, and still of right ought to be made into the said court of mayor and aldermen, and that the said court of mayor and aldermen holden as aforesaid according to the custom of the said city from time whereof, &c. hath had, and of right ought to have had, and still of right ought to have the cognizance, jurisdiction, and authority of examining, hearing, determining, and adjudging of and concerning the election and return of every person elected into any place or office within the said city, at any such wardmote court holden as aforesaid, whensoever the merits of any such election or return have been brought into question by the petition of any person interested therein, to the said court of mayor

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and aldermen holden as aforesaid. And we, the said mayor and aldermen, do further certify and return that from time whereof, &c. there hath been, and still of right ought to be within the said city a certain court or assembly called the court of common council, holden before the mayor or his locum tenens, and the aldermen of the said city for the time being, and the commons of the said city, or the major part of them, duly elected and chosen according to the custom of the said city in that behalf, being assembled together upon reasonable summons thereof previously given according to the custom of the said city; which said commons of the said city so elected as aforesaid, together with the mayor, or his locum tenens, and aldermen aforesaid, during all the time aforesaid, have been the common council of the said city, to consult of and upon all matters and things proposed in common council concerning the said city, and to give and declare their assent and dissent as well for themselves as for the rest of the commonalty and citizens of the said city; and that the said mayor or his locum tenens, aldermen, and commons, or the major part of them, so assembled in common council, during all the time aforesaid have been used and accustomed, and have had and still have a right to make, constitute, and appoint such reasonable ordinances, acts, and bye-laws as to them seemed meet and convenient for the better government, order, and regulation of the said city. And we the said mayor and aldermen do further humbly certify and return that from time whereof, &c. until the making and passing of a certain bye-law or act of common council, duly made at a court of common council duly holden in the said city, according to the custom of the said city; on the

1st day of *August*, in the twenty-first year of the reign of King *Richard* the Second, touching the election of aldermen for the said city, whereby it was ordained that; for the future, in the elections of aldermen, two, at least, honest and discreet men should be chosen and presented to the mayor and aldermen, so that either of them whom they should choose might be admitted and sworn; and also after the making and passing of a certain other bye-law or act of common council, duly made at a court of common council, duly holden in the said city aforesaid, according to the custom of the said city, on the 15th day of *April*, in the thirteenth year of the reign of her late majesty Queen *Anne*, touching the election of aldermen of the said city, intituled "An act for reviving the ancient manner of electing aldermen," whereby, after reciting (amongst other things) that by the ancient usage and custom of the city of *London*, when any ward of the said city became vacant and destitute of an alderman, the inhabitants of that ward having a right to vote in such elections were wont to choose one person only, being a citizen and freeman of the said city, to be alderman of the same ward, for reviving the said ancient custom and restoring to the said inhabitants their ancient rights and privileges of choosing one person only to be their alderman, it was enacted, "That from thenceforth, in all elections of aldermen of the said city, at a ward-mote to be holden for that purpose, there should be elected, according to the said ancient custom, only one able and sufficient citizen and freeman of the said city, not being an alderman, to be returned to the court of lord mayor and aldermen as therein mentioned," as by such bye-law or act of common council may more fully appear; and from thence hitherto the aldermen of divers

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wards of the said city, and, amongst others, of the ward of *Vintry*, have of right been elected and chosen at such wardmote courts as aforesaid, holden as aforesaid in the said respective wards, by virtue of such precepts as aforesaid, one alderman for each ward. And we the said mayor and aldermen further humbly certify and return that a vacancy having occurred in the place and office of an alderman of the ward of *Vintry* aforesaid by the death of *Christopher Magnay* Esq., late alderman thereof, a court of wardmote was holden on *Thursday* the 2d day of *November*, in the year of our Lord 1826, and by adjournment on other subsequent days, in and for the said ward of *Vintry*, before the Right Honourable *William Venables*, then mayor of the said city, by virtue of a precept for that purpose before then duly issued, according to the custom of the said city, for the election of an alderman of the said ward in the room and stead of the said *Christopher Magnay*, at which court of wardmote divers persons, being then present, voted for the said *Henry Winchester* as and for such alderman, and the said *Henry Winchester* by reason thereof claimed to be duly elected into the said office or place of alderman so vacant as aforesaid, and a return to the said precept was afterwards, on the 19th day of *December*, in the said year of our Lord 1826, made into the said court of mayor and aldermen, then duly holden in the *Guildhall* of the said city, according to the said custom as aforesaid; and it was by the return thereof stated to the said court that the said *Henry Winchester* was duly elected alderman of the said ward. And we the said mayor and aldermen further humbly certify and return that *Edward Archer Wilde*, a citizen and freeman of the said city, and candidate at the
said

said election at the said wardmote court, and being a person interested in the said election, and also other persons being interested in the said election, presented petitions to the said court of mayor and aldermen on the said 19th day of *December*, in the said year of our Lord 1826, complaining of the said election, and touching the merits of the said election, and praying that the same might be declared null and void by the said court; whereupon the said court of mayor and aldermen adjourned the consideration of the said petitions until the 28th day of *December*, in the said year of our Lord 1826, on which day the court of mayor and aldermen, being then and there duly holden in the *Guildhall* of the said city, according to the said custom, took the said petitions into consideration, and having heard the petitioners and the said *Henry Winchester* by their respective counsel, touching the said election, did according to the said ancient custom examine, determine, and adjudge of and concerning the said election so brought into question by the said petitions; and due deliberation being thereupon had, did adjudge and determine the said election to be null and void, and did order and direct a precept to be issued for another election of an alderman for the said ward of *Vintry* in the room of the said *Christopher Magnay* deceased. And we the said mayor and aldermen do further humbly certify and return that the said *Henry Winchester* was no otherwise elected into the said place and office than as hereinbefore mentioned. And we the said mayor and aldermen further certify and return that the said *Henry Winchester* was not duly elected into the place and office of alderman of the said ward of *Vintry*, in the said city, as by the said writ is supposed and suggested; and for

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these reasons and causes, we the said mayor and aldermen of the said city cannot admit and swear, nor ought we to admit and swear the said *Henry Winchester* into the said place and office of alderman of the ward of *Vintry* aforesaid, as by the said writ we are commanded.

And, thereupon, on the same *Friday* next after the morrow of the *Holy Trinity* before our said lord the king at *Westminster*, came as well the said *Henry Winchester* in the said writ and return named, by *Charles Francis Robinson* his clerk in court, as the said mayor and aldermen of the said city of *London*, in the said writ and return named, by *Peregrine Dealtry* their clerk in court; and the said *Henry Winchester* having heard the said writ and return read, protesting that the said return and the matters therein contained are insufficient in law to bar and preclude him from having a peremptory writ of mandamus in this behalf, for plea the said *Henry Winchester* by force of the statute in such case made and provided saith, that he, the said *Henry Winchester*, was duly elected into the place and office of alderman of the said ward of *Vintry* in the said city, in manner and form as in the said writ is suggested, and the said *Henry Winchester* prays that this may be enquired of by the country. Similiter by the defendants.

At the trial before Lord *Tenterden* C. J., at *Westminster* after last *Hilary* term, a verdict was found for the crown, subject to the opinion of this Court on the following case: —

A vacancy having occurred in the office of alderman for the ward of *Vintry*, in the city of *London*, by the death of *Christopher Magnay* Esquire, the Right Honorable *William Venables*, then lord mayor of the city of *London*, duly issued his precept on the 28th of
October

October 1826, for holding a wardmote in order to supply such vacancy. That precept was as follows:—

“To the common councilmen of the ward of *Vintry*, in the city of *London*. These are to require you to cause a wardmote to be duly summoned and held before me, the Right Honorable *William Venables*, lord mayor of the city of *London*, at *Cutler's Hall* in the said ward of *Vintry*, on *Thursday* next, the 2d day of *November* 1826, at half past two of the clock in the afternoon of the same day, for the choice of a fit and able person to be alderman of the said ward, in the room and stead of *Christopher Magnay* Esquire, deceased. Hereof fail not.”

Under this precept a wardmote was duly held on the 2d day of *November* 1826, at *Cutler's Hall*, for that purpose, when three candidates were duly proposed for that office: viz. *Henry Winchester*, Esquire, citizen and cutler; *Edward Archer Wilde*, Esquire, citizen and dyer; and *Thomas Crook*, Esquire, citizen and cordwainer: a poll was duly demanded and granted, and the lord mayor appointed three poll clerks for taking the votes at that election, *Ralph Richardson*, *Thomas Watts*, and *William Peacock*. These persons were duly sworn, pursuant to 11 G. 1. c. 18. s. 1., to take the poll, and each was provided with a book for the purpose of entering therein such polls as should be taken by such respective clerks. On the 2d of *November* 1826, only three persons were admitted to vote, one of these, viz. *George Dickens*, voted for *Henry Winchester*, Esquire, his vote was duly taken by *William Peacock* in his poll-book. *John King* voted for *Edward Archer Wilde*, Esquire, and his vote was duly taken by *Thomas Watts* in his poll-book; and *Richard Shepherd* voted for *Thomas Crook*, Esquire, and his vote was also duly taken

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taken by *Thomas Watts* in his poll-book. There were no votes taken by *Ralph Richardson* on the 2d of *November*.

At the close of the poll on the 2d of *November* 1826, the poll-books were all duly sealed up by the lord mayor pursuant to 11 G. 1. c. 18. s. 4.

On the next day, *November* 3d, at the opening of the poll at the place of election, the lord mayor, in the presence and hearing of all the candidates and their friends, stated, that as the ward was small and more than one poll-clerk was unnecessary, it would be a convenience both to him and the electors to have but one, and he then directed *Ralph Richardson* to be the sole poll-clerk, for taking the poll during the remainder of the election. This was not objected to by any of the candidates, or any other person whomsoever. From this time *Ralph Richardson* acted throughout the subsequent proceedings of the election as the sole poll-clerk. In the course of the second day of the poll, *Richardson* transcribed from the poll-books of *Peacock* and *Watts*, into his own poll-book, the three votes taken on the 2d of *November*; at the trial, the two original poll-books of *Peacock* and *Watts* were produced, and it was admitted that the votes had been transcribed accurately from them, though not in the proper order, into *Richardson's* poll-book, which was also produced in evidence. On the close of the poll on the 3d day of *November*, and again on the 4th of *November*, when the election terminated, the poll-book of *Richardson* was signed and sealed up by the lord mayor.

The poll finally closed on the 4th of *November*, and the wardmote was then duly adjourned to the 6th of *November* at the same place, by a proclamation directing the

the suitors to depart thence, and give their attendance on the 6th of *November* at half past ten o'clock in the forenoon at the same place.

On that day *Richardson's* poll-book was publicly opened at the place of election, and cast up, including the votes transcribed by *Richardson* from the other poll-books, when the numbers were stated to be,

For <i>Henry Winchester</i> Esquire	-	-	30
For <i>Edward Archer Wilde</i> Esquire	-	-	27
For <i>Thomas Crook</i> Esquire	-	-	3

And these numbers were accordingly there publicly declared to the electors on the 6th *November* 1826, by the Right Honourable *William Venables*, the lord mayor and presiding officer at such election.

Immediately on this declaration being made a scrutiny was duly demanded by the said *Edward Archer Wilde*, and granted; and the proceedings of the wardmote on the 6th of *November* terminated by a proclamation "that the suitors might depart thence and give their attendance on a fresh summons." This form of proclamation is also adopted in the city of *London* at courts of wardmote and of common hall, which are also held by precepts from the lord mayor, when the business for which such courts have been called is terminated. The form adopted when the business is not terminated is to adjourn the court to some stated day; and in such cases no mention is made in the proclamation of the suitors being required to attend again on fresh summons, nor is any new precept issued.

On the 8th of *November* the Right Honourable *William Venables* went out of office as lord mayor of the city of *London*, and was on that day succeeded by the Right Honourable *Anthony Brown*.

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On the 21st day of *November* the said Right Honourable *Anthony Brown*, then lord mayor of the city of *London*, issued the following precept:—

“ To the common councilmen of the ward of *Vintry*, in the city of *London*.

“ By the Mayor.

“ Whereas on the 6th day of *November* instant a wardmote for the ward of *Vintry* was by several previous adjournments continued and held on that day for the election of an alderman of the said ward in the room of *Christopher Magnay* Esquire, deceased, and a scrutiny being that day demanded in favour of *Edward Archer Wilde* Esquire, one of the candidates, a scrutiny was also demanded on behalf of *Henry Winchester*, one other of the candidates, which were severally granted by *William Venables* Esquire, then lord mayor, and scrutineers were named by each of the said candidates, and the wardmote was adjourned, and the electors ordered to attend on a fresh summons; these are, therefore, to require you to cause a wardmote to be summoned and held before me at *Cutler's Hall*, in the ward of *Vintry*, on *Friday* the 24th of this instant *November*, at ten o'clock in the forenoon of the same day, for the purpose of proceeding on the said scrutiny. Hereof fail not.”

Under this precept the wardmote met on the 24th of *November*; both the lord mayor *Brown*, who presided, and the late lord mayor *Venables* were present at the opening of it, and *Richardson's* poll-book was handed over by the late lord mayor to the Right Honourable *Anthony Brown*, the then lord mayor and presiding officer, when the late lord mayor (*Venables*) left the court,

court, and did not afterwards attend at or interfere in the said election.

Before the scrutiny was entered upon, the following protest, in writing, was tendered by *E. A. Wilde* to the lord mayor, as presiding officer:—

“*Vintry ward*. — Being advised that the proceedings at this wardmote, in respect of the scrutiny of the votes taken on the election of an alderman, are illegal, and will not determine the said election; and your lordship having determined to proceed therewith, I hereby protest against being concluded from taking any objection hereafter to these proceedings, by now objecting to the votes given in favour of Mr. Sheriff *Winchester*, and supporting the votes given in my favour; or taking any other part in the business of this wardmote.”

At the close of the scrutiny the lord mayor, *Brown*, declared Mr. *Winchester* to have been duly elected, and the following return was made to the court of aldermen:—

“At a wardmote holden on *Thursday*, the 2d day of *November* 1826, at *Cutler's Hall*, in the ward of *Vintry*, before the Right Honourable *William Venables*, the then lord mayor of the city of *London*, for the election of alderman of the said ward, in the room of *Christopher Magnay Esquire*, deceased.

“The only candidates proposed were *Henry Winchester Esquire*, citizen and cutler; *Edward Archer Wilde Esquire*, citizen and dyer; and *Thomas Crook Esquire*, citizen and cordwainer; and which same candidates were severally put in nomination for the said office, when it appeared upon the shew of hands, that the said *Henry Winchester* had the majority, and thereupon the said *Edward Archer Wilde* and *Thomas Crook* demanded a poll, and upon the said demand being made, the said

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Henry Winchester also demanded a poll, which was granted by his lordship, and ordered to commence, and at a quarter before five of the clock in the afternoon the poll was closed for that day, in the presence of the said candidates, and by proclamation his lordship adjourned the said wardmote till *Friday*, the 3d day of *November* then instant, and now last past, at ten o'clock in the forenoon; and pursuant to such adjournment his lordship went to the said wardmote and opened the same, and continued the said poll from the said hour of ten of the clock in the forenoon until four of the clock in the afternoon of the same 3d day of *November*, and then closed the same for that day, in the presence of the said candidates. And by a further proclamation, adjourned the said wardmote until *Saturday*, the 4th day of *November* then instant, and now last past, at ten of the clock in the forenoon; and pursuant to such last mentioned adjournment, his lordship went to the said wardmote, and opened the same, and continued the poll from the said hour of ten of the clock in the forenoon, until four of the clock in the afternoon of the same 4th day of *November*, and then finally closed the same in the presence of the said candidates; and by further proclamation, adjourned the said wardmote until *Monday*, the 6th day of *November* then instant, and now last past, at half past ten of the clock in the forenoon; and pursuant to such last mentioned adjournment, his lordship again opened the wardmote at half past ten of the clock in the forenoon of the same 6th day of *November*, and declared the numbers to be, for

<i>Henry Winchester</i> Esquire	-	-	30
<i>Edward Archer Wilde</i> Esquire	-	-	27
And <i>Thomas Crook</i> Esquire	-	-	3

And

And thereupon declared the choice had fallen on the said *Henry Winchester* Esquire, citizen and cutler, and declared him duly elected alderman of the said ward. The said poll-books were by the consent of the candidates, sealed up by his lordship, and kept in his possession during the said several adjournments; and upon the aforesaid declaration being made, the said *Edward Archer Wilde* demanded a scrutiny, and upon the said demand being made, the said *Henry Winchester* also demanded a scrutiny, which were severally granted by his lordship, and the said wardmote was adjourned, and the electors ordered to attend on a fresh summons; and on Friday the 10th day of November now last past, a copy of the poll was delivered to each of them, the said *Henry Winchester* and *Edward Archer Wilde*, pursuant to the statute." The return then stated all the proceedings in the scrutiny, upon which nothing turned, and concluded by stating, that "the lord mayor as and in the place of election, openly and publicly declared that the said *Henry Winchester* Esquire, was duly elected alderman of the said ward, in the room of the said *Christopher Magnay* Esquire, deceased; and the number of legal votes for each candidate appearing to him upon such scrutiny, was as follows; that is to say,

For <i>Henry Winchester</i> Esquire	-	-	26
For <i>Edward Archer Wilde</i> Esquire	-	-	23
For <i>Thomas Crook</i> Esquire	-	-	3

And the said wardmote was then by order of his lordship dissolved. All which I humbly certify to this honourable court, this 19th day of December 1826.

(Signed)

" G. T. R. REYNAL,

" Attorney in waiting."

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Upon the above return being made to the court of aldermen, the proceedings set forth in the return to the mandamus were had.

The acts of common council of the city of *London*, of the 6th *December* 1712 (a), 15th *April* 1714, and 17th *April* 1812 (b), were proved.

The questions for the consideration of the Court were,

First, Whether the decision of the court of aldermen, as set forth in the return to the mandamus, were conclusive; and if not, then, secondly, Whether, upon the facts stated, Mr. *Winchester* was duly elected.

Alderson for the crown. If Mr. *Winchester* was duly elected in pursuance of the statute 11 G. 1. c. 18., and there is nothing in the return to prevent his admission, if duly elected, a peremptory mandamus must be awarded.

For the purpose of the argument, it must be assumed that he had the majority of legal votes. First, then, he was duly elected in pursuance of the 11 G. 1. c. 18. That statute applies as well to the election of members of parliament as of city officers. The first section provides that the presiding officer shall appoint a convenient number of clerks to take the poll. It does not say that the same number shall be continued throughout the proceeding, and it would be a very narrow construction of the act to hold that such is its effect. The objection,

(a) By which it was provided (amongst other things) that the wardmote-court should be adjourned from time to time, and kept on foot for that purpose until it should be there openly declared, after a scrutiny, if demanded, which of the candidates was duly elected.

(b) Which provided that the lord mayor shall, within eight days after a vacancy in the office of alderman, summon a wardmote to elect another.

there-

therefore, founded on the circumstance that two poll-clerks were dismissed after the first day, is unavailing. When made to a similar proceeding by a sheriff at an election of members of parliament, it was voted frivolous and vexatious, *London case (a)*. But it may be urged, that the poll-book kept by *Richardson*, who was continued poll-clerk throughout, could not contain the names of all the voters. It did, in fact, contain them, although three votes were not originally entered in it, but copied from the other poll-books, and this copy was authenticated by the presiding officer, and all three books were produced at the trial. Next it will be objected, that the presiding officer was changed during the progress of the election. That, however, cannot, with propriety, be said, for the lord mayor for the time being is the presiding officer in his corporate, and not in his individual capacity. Cases have occurred where there has been a change of sheriff during an election, but it has not been considered a valid objection, *Dorchester case (b)*. It would be very inconvenient in the city of *London* if this were otherwise, for the precept for electing an alderman must issue within a certain number of days after the vacancy occurs, and as the lord mayor goes out of office on a day certain, it may very easily happen that a lord mayor must begin an election without power to complete it. The next objection is, that the wardmote court was adjourned, not to a day certain, but to meet again on a fresh summons. It was impossible to adjourn to a fixed day, for it could not be known when the parties would be prepared to proceed with the scrutiny. The can-

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(a) 2 *Peckwell*, 268.(b) 10 *Com. Journ.* 300. *Heywood*, 14.

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didates have a certain time allowed for delivering their lists of votes objected to, and the time to be fixed for taking the scrutiny is calculated from the delivery of the lists. The presiding officer, therefore, not knowing when the lists would be delivered, could not fix a time for the re-assembling of the wardmote court. In *Rex v. Nurse* (a) it was held, that a venire facias ought not to be made returnable at a day certain, but generally at the next assizes. Even if this were held to be a dissolution of the court, and not an adjournment, it is not material, for the fourth section of the statute does not require the scrutiny to be at a wardmote court. In this part of the act the expression "wardmote court" is changed to "the place of election." But admitting all these to be irregularities, they are not sufficient to vitiate the election, for the statute, 11 G. 1. c. 18., is directory only, like many others, *Rex v. Pole* (b), *Rex v. Sparrow* (c), the *Leicestershire* case (d), and *Dublin Election* case, there cited. These are acts over which the candidate has no control, it would be hard, therefore, that he should be prejudiced by them. In the *Margate Pier Company v. Hannam* (e), Abbott C. J. adopts the dictum of Lord Coke, that "acts of parliament are to be so construed as that no man that is innocent, or free from injury or wrong, be by a literal construction punished or endamaged." If that rule be applied to this case, all the objections to the election fall to the ground. Secondly, there is nothing in the return to the mandamus which ought to prevent the admission of Mr. Winchester. It appears that the court of lord mayor and aldermen

(a) 1 Sid. 548.

(b) Selw. N. P. 1039.

(c) 2 Str. 1125.

(d) 1 Peckwell, 45.

(e) 3 B. & A. 266.

has decided that he was not duly elected, but their decision is not conclusive. By the custom set out in the return, and which may be considered as if found in an act of parliament, they claim a right to have the cognizance, jurisdiction, and authority of examining, hearing, determining, and adjudging of and concerning elections at wardmote courts to offices within the city. But there are not any negative words excluding the jurisdiction of this court. In the claim of cognizance by the university of *Cambridge* in the case of *Browne v. Renouard* (a), such words are found. And it is a general rule that the jurisdiction of this court cannot be taken away without express words, *Dr. Foster's case* (b), *Rex v. Moreley* (c), *Rex v. Sheppard* (d). In almost every corporation there exists a power of amotion, but this court may enquire whether that power has been rightly exercised; and if it has not, issue a mandamus to restore the party, *Pees v. Mayor, &c., of Leeds* (e), *Rex v. Astbridge* (f), *Rex v. Mayor of London* (g). If this return is good, and the lord mayor and aldermen have an exclusive right to decide, their decision in favor of an election would be an answer to a quo warranto information; even although it could be shewn that they had violated every provision of the 11 G. 1. c. 18., relating to the election. The power claimed is, therefore, inconsistent with that statute; and, if it ever existed, was thereby determined and annulled. Lastly, the return is inconsistent; and, therefore, a peremptory mandamus must be granted: it first states an election

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(a) 12 East, 12.

(c) 2 Burr. 1041.

(e) Str. 640.

(g) 2 T. R. 177.

(b) 11 Co. 56.

(d) 3 B. & A. 414.

(f) 2 Comp. 523.

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of Mr. *Winchester*, then that he was rejected by the court of the lord mayor and aldermen, and afterwards that he was not elected. The case of *Regina v. Mayor, &c., of Norwich (a)* is directly in point; for that related to an alderman of *Norwich*, and they, by the charter, must be elected in the same manner as aldermen of *London*. A mandamus was granted to admit one *Dunch* an alderman. The corporation returned, that he was elected by the ward, but refused by the mayor and aldermen for certain reasons there specified; and concluded "quod non fuit electus." This was held bad, and a peremptory mandamus was awarded.

Parke contra. There is not any inconsistency in this return. It first states certain acts done towards an election, then that the court of lord mayor and aldermen decided that those acts did not constitute a due election of Mr. *Winchester*; and, lastly, that he was not duly elected. In *Rex v. The Mayor, &c. of Cambridge (b)*, it was held, that a return might consist of several independent matters, not inconsistent with each other. This is quite different from the *Norwich* case. There the return began by stating that *Dunch* was elected, and ended by stating that he was not elected. It was impossible to reconcile those statements, and, therefore, the return was quashed. The return, then, is good in form, and the concluding part alone having been traversed, the residue is admitted. The custom, then, must be taken to exist as alleged, viz. that the court of lord mayor and aldermen have the authority of examining, hearing, determining, and adjudging con-

(a) 2 *Ld. Raym.* 1244.(b) 2 *T. R.* 456.

cerning elections at wardmote courts. Inferior courts have power to try many civil and criminal causes, and this Court has a common law jurisdiction over such courts, which is not to be taken away except by express words in an act of parliament. But their jurisdiction over corporations is very different. They have power to compel corporations to do their duty, but they cannot interfere with the mode of doing it. Thus in the case of a person having an inchoate right to be admitted a member of a corporation, there is no judicial power in the body corporate to adjudicate upon the right, and, therefore, this Court will enforce by mandamus the performance of the duty to admit. But if the corporation have power to elect persons or not, at their discretion, this Court cannot interfere, *Rex v. The Corporation of Ely* (a). The same principle governs the cases of amotion. At common law corporate bodies have no power to amove a party from his franchise, until he has been convicted of an offence, *Bagg's case* (b). All power beyond that must be derived from the charter. If that gives power to amove for reasonable cause, this Court will inquire into the cause, but if there is power given to amove for such cause as the corporation think reasonable, this Court cannot interfere. So in this case, the court of lord mayor and aldermen have jurisdiction to adjudicate upon the election. The custom gives them the authority of visitors, and this Court cannot inquire into the validity or invalidity of their decision, *Philips v. Bury* (c), where Lord Holt C. J. says, that a visitor in return to a mandamus, need only say that he has

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(a) 4 B. & A. 271. 1 B. & C. 85.

(b) 11 Co. 94.

(c) 2 T. R. 351.

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decided. Such visitatorial jurisdiction might well be given by charter to one part of a corporation, and the custom which is admitted to exist, must be presumed to have arisen out of a charter, and all lawful customs of the city have been confirmed by act of parliament 2 & 3 W. & M. sess. 1. c. 8. The power has been recognised in this Court. In *Reg. v. Sir G. Heathcote (a)*, it is said, "It is agreed that the court of aldermen have quashed returns in particular for want of qualification, &c. They are to choose one out of the four, and have the final determination." It is also mentioned in 2 *Stowe's Survey*, p. 53. Assuming then this customary jurisdiction to be lawful, the next question is, has it been taken away by the statute 11 G. 1. c. 18. That regulates a part only of the city elections, it begins with the appointment of poll-clerks, and regulates the proceedings down to the declaration of the election after the scrutiny; but does not mention the return to the lord mayor and aldermen, or any subsequent proceedings. Now, the ancient customs of the city being confirmed by an act of parliament, cannot be taken away by a subsequent statute, without express words or necessary implication, and in the case of *Rex v. Harte (b)*, 15 G. 3., the necessity for making a return to the lord mayor and aldermen was recognised as still existing, although not mentioned in that statute. It appears by the record in that case, that during *Bull's* mayoralty a vacancy occurred in a ward, and *Harte* and *Neate* were candidates. *Harte* had a majority at the poll, a scrutiny was demanded. The Court was adjourned to be held on a fresh summons. Then *Harte* refused to

(a) *Fort.* 294.

(b) Not reported.

attend,

attend, and votes were struck off so as to give a majority to *Neate*. *Harte* was admitted under a mandamus. *Neate* brought a quo warranto against him. He pleaded his election, but was silent as to the scrutiny and return to the lord mayor and aldermen. The replication introduced the scrutiny, and the by-law of Queen *Anne*, requiring a return of one person, for alderman, to that court. To this there was a demurrer, and judgment was given for the relator. The Court, therefore, must have held that such a return was necessary, notwithstanding the statute 11 G. 1. c. 18.

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The other points are of less general importance, but if there has been any essential violation of the proper course of proceeding, Mr. *Winchester* was not duly elected. There are three objections to the course pursued, 1st. That the wardmote court was dissolved pending the election. The wardmote court is analogous to the hundred court or court leet, 7 H. 6. c. 36. 4 *Inst.* 249. *Fort.* 288. It had a special authority to proceed to an election upon the precept issued by the lord mayor, and where a court has such special authority, the thing to be done must be completed at that court, or it is ineffectual. The court should have been adjourned to a day certain, according to the provision of the bye-law of 1712. This is analogous to the proceedings in other courts. If they are not adjourned but dissolved, all business then in progress falls to the ground, 4 *Inst.* 27. 1 *Bl. Com.* 178. *Bro. Abr.* tit. *Commission and Commissioners*, pl. 11. 1 *Ed.* 6. c. 7. s. 8. *Rex v. Polstead* (a), and applies also to elections of members of parliament, *Southwark* case (b). An election consists

(a) 2 *Str.* 1262.(b) 17 *Com. Journ.* 73.

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of several successive steps. The nomination, shew of hands, poll, and scrutiny. The precept directs that an election shall be made at the wardmote court; that is not obeyed until the result of a scrutiny, if demanded, has been ascertained. If the court is dissolved before the completion of the election, there is no mode by which the presiding officer at the next court (even supposing him to be the same person) can take notice of what was done at the former court. It is said that this court was not dissolved but adjourned; that, however, is contrary to all the definitions of an adjournment, which, according to *Cowell*, is "*diei dictio*, assignment of a day, or putting off to another day and place." *Spelman* defines it thus: "*Diem aliam dicere*." So in *Termes de la Ley*, "Adjournment is when a court is dissolved and determined for the present, and assigned to be kept again at another place or time." And this is settled by the case itself, which finds that the form adopted was that in use when a court is to be dissolved. In the next place, the election is bad, on account of the change of the presiding officer during the election. All acts at the common law must be commenced and finished by the same officer, *Clerk v. Withers* (a), and it is very reasonable to apply the rule to this case, for the lord mayor must, at the peril of an action, make a true return of what has been done, and it would be hard to call upon him for a return of proceedings at which he was not present, and of which he cannot judicially know any thing. Then as to the poll-clerks, the objection is, that of the first day's poll, no such book as the act requires was kept. *Richardson's* book merely

(a) 2 *Ld. Raym.* 1072.

contained a copy of that which had been taken by others, and he was not sworn to make a faithful copy, but only to *take the poll* correctly.

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Alderson in reply. The question as to the jurisdiction of the court of lord mayor and aldermen, is the only one of any importance. The argument for the defendant rests entirely upon the supposition, that they are quasi visitors; but in *Phillips v. Bury*, which has been cited in support of that argument, Lord *Holt* clearly points out the distinction between corporations for public and those for private purposes. Of the former he says, "Those that are for the public government of the town, city, mystery, or the like, being for public advantage, are to be governed according to the law of the land." Of the latter, "But private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them." With respect to the supposed dissolution of the wardmote-court, the case of *Rex v. Harte* is an authority for the crown. There it appeared that there was an adjournment to re-assemble on fresh summons, and it was not treated as a dissolution.

Cur. adv. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court :

Upon the argument of this case, which embraced both the return and the facts found at the trial of the issue, it was contended that the return was inconsistent : if we were of that opinion, then the return ought to be quashed.

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quashed. But we think the return is not inconsistent, for there is no repugnance in alleging that a person was not duly elected, and that a tribunal, authorized to decide upon the election, has adjudged the election to be void. These matters, although distinct from, are perfectly consistent with each other. This brings us to the consideration of the questions distinctly referred to at the end of the special case.

And, first, as to the jurisdiction of the court of the lord mayor and aldermen. If that court has authority to decide finally, and the jurisdiction of this Court is excluded, the other question does not arise.

It is alleged in the return, that the court of the lord mayor and aldermen is a court of record, and has been such from time immemorial; and that, from time immemorial, the court of the lord mayor and aldermen has had the cognizance, jurisdiction, and authority of examining, hearing, determining, and adjudging of and concerning the election and return of every person elected into any office within the city, at a court of wardmote (and the election in question was at a court of wardmote,) whenever the merits of such election and return are brought into question by the petition of any person interested therein: that this election was so brought into question, and adjudged to be a void election. The return does not allege that the court of the lord mayor and aldermen have the *sole and exclusive* cognizance, but only that they have the cognizance. Whereas, in a claim of cognizance of a suit, it is always alleged in some form of words, that the court claiming the cognizance has the sole and exclusive jurisdiction, and that the authority of other courts is excluded. And if there be no allegation to this effect, the claim is disallowed.

The

The claim in the *Cambridge* case, *Browne v. Renouard* (a), was to that effect. The claim made by this return is not properly and strictly a claim of cognizance of a suit, but it is perfectly analogous to it, and must be governed and determined upon the same principle of law. And this principle is, that the jurisdiction of the king's superior courts, as to matters originally cognizable by them, cannot be taken away but by express words, or, perhaps, by a necessary implication which must be intended of the use of such words as are absolutely inconsistent with the exercise of a jurisdiction by the superior courts, and to which effect cannot be given but by the exclusion of such a jurisdiction. Let us, then, see whether the authority claimed in this return, taking it not only to have existed, as alleged, from time immemorial, but considering, also, that (being in the case of the city of *London*) this ancient usage must be understood to have had the confirmation of the legislature, is inconsistent with the jurisdiction of the Court of King's Bench, or whether both may not exist together, the authority of the city court being subordinate to and subject to the controul and revision of this Court.

Corporations in general have power to remove the members of the select body for a sufficient cause. Might it not be alleged, in the very words of the present return, that the corporation has the cognizance, jurisdiction, and authority of examining, hearing, determining, and adjudging of and concerning the removal of a member, upon complaint made of misbehaviour by some other member or person interested in the welfare of the corporation, and the conduct of the members of the select body? Yet, certainly, no person would consider

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a return to that effect to be a sufficient answer to a mandamus to restore. Or, to advance still higher, the Court of Common Pleas has the cognizance, jurisdiction, and authority of examining, hearing, determining, and adjudging of and concerning pleas of land; and in the first instance, that court alone has generally the cognizance. &c. So this Court has the like cognizance, &c. as to pleas of the crown. And yet, the decisions of each of these Courts are subject to the correction of a superior court on a writ of error; so that the allegation of cognizance, &c. does by no means import sole and absolute cognizance and authority to determine and adjudge without revision or controul.

Then, if the allegation in this return is not so made, and in such form of words as necessarily to exclude the authority of this Court, is there any thing in the substance of the allegation, or in the subject-matter, that will warrant such an effect to be given to it? If this authority of the court of lord mayor and aldermen be a sufficient answer to a mandamus to admit to an office, it must also be a good plea in bar to an information in the nature of a quo warranto, or even to a quo warranto by the attorney-general. And the consequence will be, that the court of the lord mayor and aldermen will have in their hands the absolute controul over all the elections to city offices by the wardmotes, because they may declare every election void, one after another, until a person agreeable to themselves shall be chosen. Let me not be supposed to insinuate the probability that any thing of this kind should take place in modern times. I mention the possibility as an argument only against giving to this allegation the effect to which I have alluded. The common law has a proper jealousy of the judg-

judgments of all its tribunals, and manifests that jealousy by its abundant provision for successive writs of error, until you arrive at the highest court and final authority, which must of necessity exist somewhere in every country.

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It may be asked, of what use is this authority and power of the court of lord mayor and aldermen if their decision be not final? I will not answer this question by asking of what use is the authority of any court whose decisions are not final? but I answer affirmatively, it is of great use. The decisions often have been, and I trust, often will be acquiesced in, from a sense of their propriety, and thereby much delay, expense, and agitation prevented. And we should greatly regret our decision on this point, (upon which we cannot avoid a decision), if it should have the effect of preventing the exercise of what we consider to be a very useful and salutary power.

It was contended in support of the return, that this power of the court of the lord mayor and aldermen was in the nature of a visitatorial power, but no instance was mentioned in which one part of a corporation has a visitatorial authority over another part. The visitatorial power emanates from the founder. In royal foundations of a private or eleemosynary character, if no special visitor has been appointed, the king exercises the power by his chancellor. In corporations established for the government of cities and towns, the king may be said to exercise the power by this Court, his Court before himself, according to the law and constitution of the country. Further, all ancient customs and prescriptions are to be considered with reference to the rules of the common law; if found to be repugnant to those rules,
and

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and contrary to law on any ground, they have always been held to be invalid. And an act of parliament confirming, in general terms, the ancient usages and customs of a city, must, as I apprehend, be considered to confirm those only which have not such repugnance or contrariety. Many matters are good and valid by custom and prescription, which would otherwise be invalid, and to such only ought a general confirmatory statute be understood to relate.

The rule to which I have alluded, as to the jurisdiction of the king's superior courts, has been acted upon in many cases; some were quoted at the bar. It is unnecessary to refer to them, because the rule is so well known and generally recognised. The case of *Sir G. Heathcote, Fort. 294.* is certainly no authority in support of this return. It does not appear by the report distinctly what the object of the writ was, but it appears that it was a writ either issued or applied for against the lord mayor alone, and at a time when a bye-law requiring the wardmote to name four, of whom the lord mayor and aldermen were to select one, continued in force: and I do not find any expression importing that this Court had not authority or jurisdiction in the matter, though there are several that regard the expediency, and the effect of the writ which was then under consideration.

Our opinion then being, that the custom alleged in the return is not a valid answer to the writ, it is now become necessary to advert to the several objections made to the election under which *Mr. Winchester* claims to be admitted. It is not necessary to consider the effect of the statute 11 G. 1. c. 18. upon the by-laws of the corporation, (though, without doubt, where they are
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inconsistent with each other, the regulations ordained by the statute must prevail,) because, whether the objections be founded upon the one or the other, we are of opinion that they are not sufficient to invalidate the election. It is to be observed, that all these objections are upon points and matters of form only. It is not suggested that any inconvenience was occasioned; that the interest of either candidate was prejudiced, or that there was any intention to favour one in preference to the other; all that was done, was done fairly, openly, and honestly. And in determining whether an act is to become void, it is important to consider whether any inconvenience occurred in the particular instance by a departure from form, or whether any future inconvenience may be expected. The distinction between matters directory and obligatory is well known and established. An act, also, may be improper in the actor, nay, it may even subject him to a penalty, and yet, nevertheless, the act may be valid for the sake of other persons who would be injured by its invalidity. This point was so determined by the Court in the case of the *Margate Pier Company v. Hannam*.

I have thought it right to premise these observations, though, perhaps, they are unnecessary in the present case, and certainly do not concern the second objection made on this occasion. The first objection argued by the learned gentleman who appeared for the corporation was, that the wardmote had not been adjourned from time to time, and kept on foot as required by the by-law of 1712. The statute is silent as to this point. In fact, the supposed dissolution of the wardmote took place after the close of the poll, the declaration of the numbers, and the demand and allowance of a scrutiny.

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The supposed dissolution was by a proclamation, that the suitors might depart and give their attendance on a fresh summons, and it is stated in the case that this form is also adopted in the city at courts of wardmote and common hall, when the business for which such courts have been called is terminated; and that the form adopted when the business is not terminated, is to adjourn the court to some stated day, in which case there is no new summons or new precept. The case does not state that an absolute and formal dissolution is never made; and from the expression at the close of the return made to the lord mayor and aldermen, viz. "that the wardmote was then by order of the lord mayor dissolved;" it may rather be inferred that an absolute and formal dissolution is sometimes made.

By a proclamation in the form used on the present occasion, the wardmote will be in effect dissolved if there be no fresh summons; but there does not appear to be any repugnance or impropriety in issuing a fresh summons, and taking up so much of the business as may remain to be accomplished. In the present case no objection was made at the time to the form proposed; no person could be deceived by it; every person knew that a scrutiny was intended, which was a new and distinct matter subsequent to the poll; no inconvenience could result; whereas adjournment to a day named might be attended with inconvenience, because the day on which the scrutiny might commence could not then be known, and if the day named were too early there would be a fruitless meeting, and another adjournment; and if too late, the return might be unnecessarily delayed. It might also have happened that the party requiring the scrutiny might have abandoned it; and in
that

that case the wardmote might have been re-assembled (if necessary) and a return made without further delay. The course actually adopted appearing, therefore, to be the most convenient, we think the non-compliance with the letter of the bye-law does not invalidate the proceeding, and that the expression there used ought to be considered only as in the nature of an admonition or direction, but not as ordaining a matter essential to the validity of an election.

The next objection was the change of the person filling the office of lord mayor. There is nothing in the statute or the by-laws requiring identity of person; in general the person will be the same. If the change of person furnishes a valid objection in this case, it must do so upon some ground of reason or general positive law. In this case the change took place not during the continuance of the poll, nor during the continuance of the scrutiny, but in the interval which necessarily took place between the poll and the scrutiny; and the poll and scrutiny are matters perfectly distinct from each other, though both may be necessary to ascertain the majority, and authorize a return when a scrutiny is demanded. What inconvenience, then, resulted from the change of person? None has been suggested; none appears. No proceeding was interrupted. No judgment or discretion was to be exercised by the new lord mayor requiring any further or other knowledge of the facts that had occurred before his predecessor, except such only as the poll-book could afford. It was said that an action may lie against the lord mayor for a false return. Be it so; each officer might be answerable for his own acts; the first lord mayor for any that

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1629. took place before he handed over the poll-book and gave up his authority to his successor, and the successor for any that happened afterwards. The change, as I have already observed, took place in an interval between two distinct proceedings, and therefore none of the cases cited to shew that the person who begins the execution of a public duty can alone go on with it to its termination, are applicable to the facts of this case. There was, by the course adopted, no inconvenience. If the change of person should render the election invalid there would, in the present case, be the inconvenience of a double election; and hereafter if an alderman should happen to die towards the close of a mayoralty, as it could never be known beforehand whether there would be a scrutiny after a poll, it might be thought necessary to postpone the election altogether until the new lord mayor should come into office, whereby unnecessary delay would be often occasioned.

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The remaining objection relates to the poll-clerks and poll-books. The statute requires the appointment of a convenient number of poll-clerks on the demand of a poll, but it does not require that the number first appointed shall be continued throughout the election, if it be found greater than convenience requires. In this case it was so found; the lord mayor proposed to retain one only, and no person objected. Three votes had been taken down by the two poll-clerks who were dismissed, two by one, and one by the other of them. These votes were correctly transcribed by the remaining poll-clerk into the book kept by him, and the other two books were also kept, and were produced at the trial. In all this there was not only no inconvenience, but not even a departure from any thing formally prescribed;

scribed; and, as was said of an objection of this kind by another tribunal, we think this a frivolous objection.

This is our judgment upon the matters of law, but the proceeding must remain suspended until the arbitrator shall have decided upon the votes (a).

(a) It had been previously agreed, that an arbitrator should enquire into and decide upon the validity of the votes given for the several candidates.

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SAUNDERS and Others against TAYLOR.

Friday,
January 23d.

DEBT on bond, dated the 26th of *May* 1826, whereby

John Hutchins and *James Taylor* (the defendant), and *George Morrison*, became bound to *George Saunders*, *Walpole Eyre*, *F. Crace*, *W. Yarnold*, *T. Goding*, and *J. Groome*, in 2000*l.* The condition was in the following form: "Whereas at a session of sewers for the city and liberty of *Westminster*, and part of the county of *Middlesex*, held at the sewers' office, &c., on *Friday* the 3d day of *March* 1826, the above bounden *J. Hutchins* was duly appointed by his majesty's commissioners of sewers acting for the limits aforesaid, then present, to the office of one of the collectors to the said commissioners, by virtue of which said office he the said *J. Hutchins* will be entrusted to receive several of the rates and assessments made by virtue of the commissions of sewers for the limits aforesaid, for and in respect of divers common sewers within the limits of the said commissions; now the condition of the above-written obligation is such that if the above bounden *J. Hutchins*

The condition of a bond, given to commissioners of sewers by a collector of rates, was, that the collector should at all times render a faithful account to the commissioners for the time being of all such sums of money as had already been collected or received, or which thereafter should be collected or received by him, by virtue of any rates for and on account of such commissioners, and should pay to the commissioners for the time being all monies already received, or which should thereafter be received by him: Held,

that the collector was bound to account for, and pay to the commissioners for the time being, sums of money collected and received by him, by virtue of a rate made by commissioners acting under a commission, which expired before the execution of the bond.

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do and shall from time to time and at all times hereafter during the time he shall continue as such collector as aforesaid, in all things faithfully and diligently use his best and utmost endeavours to collect, get in, and receive all and every such rate and rates, sum and sums of money as shall from time to time be given him in charge by the said commissioners of sewers for the time being for the city and liberty of *Westminster*, and part of the county of *Middlesex* aforesaid, to collect, get in, and receive; and also if he the said *John Hutchins* do and shall from time to time and at all times hereafter render a just and faithful account to the said commissioners of sewers for the time being, or to their clerk, of all such sums of money as have *been already collected, got in, and received*, or which shall at any time hereafter be collected, got in, and received by him the said *J. Hutchins* upon or by virtue of any rates or assessments, or otherwise howsoever, for or on account of such commissioners of sewers; and also do and shall from time to time, and at all times hereafter, well and truly pay or cause to be paid unto the said commissioners of sewers for the time being for the limits aforesaid, or unto their treasurer or treasurers for the time being, or unto such other person or persons as the said commissioners shall from time to time order or appoint, all such sums of money, rates, and assessments *already got in and received*, or which shall at any time or times hereafter be collected, got in, and received by the said *J. Hutchins*; and also do and shall well, truly, justly, and honestly in every respect behave himself in the said office of collector, then the above-written obligation to be void and of none effect, otherwise to be and remain in full force and virtue.

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The cause was referred by order of *Nisi Prius* to an arbitrator, who by his award assessed the damages sustained by the plaintiffs in respect of the breaches of the condition of the bond at the sum of 1900*l.* A rule nisi had been obtained for setting aside the award, on the ground that the arbitrator had included in that sum 392*l.* 10*s.* which were arrears of a former rate received by the collector before the issuing of the commission under which the plaintiffs acted. It appeared by the affidavits that *Hutchins* had been collector of the rates for thirty years before *May* 1826, and that on the 20th of *January* 1826, the then commissioners of sewers made a rate for the ensuing year, and on the 3d of *February* delivered the rate-book to *Hutchins*, and a warrant to collect the same. *Hutchins* in *February* 1826 collected by virtue of the warrant 392*l.* 10*s.* Between the 27th of *May* 1826 and the 6th of *July* 1826 he accounted for and paid that and other monies to the treasurer of the commissioners by check drawn on his bankers, and specifically appropriated that sum to the collection first made by him under the said rate of 1826. And the defendant contended that he had no power to make such appropriation, but that the sum of 392*l.* 10*s.* should be applied to the payment of the monies received under the new rate. On the 3d of *March* 1826 a new commission was issued, under which the plaintiffs were appointed commissioners, and the bond in question was executed on the 26th of *May* 1826.

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The *Solicitor-General*, *Scarlett*, and *Holt*, in last *Easter* term, shewed cause. The sum of 392*l.* 10*s.* was properly included in the sum awarded to the plaintiffs; for the condition of the bond requires that *Hutchins* shall render a faithful account to the commissioners for the time

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being of all sums *already got in and received*, or which shall hereafter be got in and received. By the statutes of sewers all orders for rates already made by the commissioners pro tempore are not dissolved by the renewal of the commission, but subsist in full force. The bond is, indeed, given to the commissioners for the time being, but the condition of the bond is not limited to the due payment of rates collected under assessments made by the authority of the subsisting commissioners, but extends, in its terms, to the rendering of a just and faithful account, "as well of all such sums of money as have been already received, as of sums which shall be hereafter received." Unless bonds of this description were taken the commissioners never would be safe. Their own appointments are not permanent, and it may be impossible to wind up all the assessments during the subsistence of any single commission. Arrears must be collected, and it is but reasonable that a collector, appointed by a new commission, should have in charge to collect the arrears of former rates. It is, therefore, no strained construction of the condition of this bond to infer that it included the sum in dispute of 392*l.* 10*s.* But it is said that this appropriation by the collector *Hutchins* is an injustice to the present sureties. But how so? The collector *Hutchins* paid in money which he specifically applied to the discharge of the arrears. The appropriation, therefore, was not the act of the commissioners, but of their collector, and the sureties are responsible for his acts.

Gurney, F. Pollock, and Serjt. E. Lawes contra. The Plaintiffs are not entitled to recover under this bond a sum of money received by the collector by virtue of his appointment under a former commission. The bond
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only requires that the collector shall faithfully discharge the duties belonging to his office from the 3d of *March*. The recital that he would be entrusted, rather imports that he was not to be liable at all before the date of the bond. The subsequent part of the condition, which renders him liable for by-gone payments, must be restrained to payments made to him between the 3d of *March*, when the plaintiffs were appointed commissioners, and the 25th of *May*, the date of the bond. As to the appropriation, the collector had no right against the defendant as surety, to apply the money received under a rate made by the present commissioners, in discharge of the debt due to the former commissioners.

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Cur. adv. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court : —

This case came before the Court on a rule for setting aside an award made in pursuance of a reference at *Nisi Prius*. The action was on a bond entered into by the defendant as surety for one *Hutchins*, on his being appointed a collector by commissioners of sewers. The only point remaining for our consideration is that which was raised upon the construction of the bond, and the mode of accounting by the collector.

The bond is dated in *May* 1826, and the obligees are part of the commissioners appointed by a commission issued not long before. *Hutchins* had been collector of the rates under a former commission, and it was objected, that the arbitrator had charged the defendant with a sum of 392*l.* 10*s.*, arrears of a former rate made under the authority of a prior commission, and to which it was contended that the bond in question did not apply. Now it appears, that if *Hutchins* had specially

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applied the money received by him after the new commission, whether from the old, or from the new rate, or from any other source, to the discharge of the arrears under the old rate, the amount of the ultimate deficiency would have been the same, and would have fallen wholly on the new rate, and, consequently, on the bond in question. It is only by considering that no special appropriation was made of his payment at the time, and that the surety has now a right to apply to the discharge of the new rate all that was actually received after the new rate, although a part of the receipt was money due from the payers under the old rate, and actually paid by them in discharge of that rate, that any question of law on the construction of the bond can arise, and giving to the defendant this mode of considering the case, we are, nevertheless, of opinion that he is answerable for the sum in dispute by virtue of his bond.

The bond is given to the plaintiffs by their personal names, not calling or describing them as commissioners. The condition recites that at a session of sewers held for the city and liberty of *Westminster* the 3d of *March* 1826, *Hutchins* was appointed by his Majesty's commissioners of sewers acting for the limits aforesaid then present, to the office of one of the collectors to the said commissioners, by virtue of which office he would be entrusted to receive several of the rates and assessments made by virtue of the *commissions of sewers* for the limits aforesaid. And the condition is, first, that if *Hutchins* shall use his best endeavours to collect and receive all such rates and sums of money as shall from time to time be given him in charge by the said commissioners of sewers for the time being, for the city, &c., to collect and receive. Secondly, that if he shall at all times thereafter render a faithful account to the said commissioners

missioners of sewers for the time being of all such sums of money as *have been already collected* or received, or which at any time thereafter may be collected and received by him upon or by virtue of any rates or assessments, or otherwise howsoever, for or on account of *such commissioners of sewers*. Thirdly, that if he shall pay to the said commissioners for the time being, for the limits aforesaid, all money, &c., *already received*, or which shall hereafter be received by him, and behave himself well in the said office of collector, then the obligation to be void, otherwise, &c.

In construing this instrument, it is proper to attend to the character of commissioners of sewers, as well as to the words of the bond. The commissioners act under commissions issued from time to time by his majesty for the discharge of a public trust for the public benefit; the trust and the benefit are permanent, although the personal authority of the commissioners is temporary; and acts begun under one commission are continued under another. Orders made under one commission are enforced under another, just as proceedings begun under one commission of oyer and terminer and gaol delivery, are carried on under another, although all the commissioners may be changed. The commissioners for the time being act not as a corporation, but they are in many respects analogous to a corporation. A rate made by the commissioners appointed at one time, if not wholly collected and accounted for before a new commission issues, is to be collected after such new commission, and to be paid to and applied by the persons appointed under the new commission; the trust, the benefit, and the object, still remaining unchanged. The collector appointed under a new commission, certainly *may* be the officer by whom the arrears of a former rate
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are to be collected and accounted for. The account must be rendered to the new commissioners, whether collected by an officer of their own appointment, or by an officer appointed under the former commission, because the personal authority of the commissioners appointed under the former commission has ceased; and so it must be if the officer appointed under the former commission had received the money before the new commission took effect, and had not accounted for it to the new commissioners by whom he was appointed. If, therefore, a collector appointed under a former commission should be appointed under a new commission, and there should be any money then in his hands, or any money should afterwards come into his hands as arrears of a former rate, he must account for and pay over such money to the commissioners from whom he receives his new appointment, so long as their commission remains in force. This being so, a bond taken for the due discharge of the office of a re-appointed collector, would not be applicable to the whole duty of his office, if it should be confined to the collecting and accounting for a rate made under the commission in force at the time of his appointment. It is true, however, that the language of a condition may be such as to require this limited and confined construction. We are, therefore, to look at the language of the condition of this bond, in order to ascertain whether it be so limited; and upon the perusal and consideration of its language, we are clearly of opinion, that it is not so limited, but extends as it ought to do, to all monies received by the collector *Hutchins*.

It appears, that he received his appointment from such of the commissioners as were present at the time; that by virtue of his office he would be entrusted to receive,

ceive, what? not rates made under the authority of the commission then in force, but several of the rates made by virtue of the commissions of sewers for the limits aforesaid,— words sufficiently large to comprehend former commissions as well as the present, and, without doubt, intended to do so. We then come to the condition: by the first branch of which he is to endeavour to collect and receive all such rates and sums *as shall be given* him in charge, by whom? not by the commissioners appointing him, but by the commissioners of sewers for the time being for the city aforesaid. This branch, therefore, would apply to a rate given in charge to *Hutchins* under a new commission that might be afterwards issued. By the second branch, he is to render an account *to the said commissioners of sewers for the time being* of all money *already received*, or to be hereafter received by him by virtue of *any* rate, or otherwise on account of such commissioners of sewers: and in the strictest grammatical construction, these words, *such commissioners of sewers*, are to be referred to the last antecedent, viz. the commissioners of sewers for the time being; so that this branch plainly includes any rate made as well by the former as by the then existing commissioners: and by the next branch, he is to account for and pay to the commissioners of sewers for the time being all such rates and sums of money *as have been already received*, or may at any time thereafter be received by him, and honestly behave himself in every respect in the said office of collector, that is in the office, by virtue of which, according to the recital, he will be entrusted to receive several of the rates made by virtue of the commissions of sewers.

There is nothing, therefore, in the language of this bond that can warrant the Court in giving to it that limited

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construction for which the defendant has contended; but the whole frame of it plainly shews that it must be extended to comprise the sum in dispute, such construction being conformable to the language of the instrument and to the duty, the performance of which it was intended to enforce.

The rule, therefore, for setting aside the award, must be discharged.

Rule discharged.

Friday,
January 23d.

SHARP against BAILEY.

Where the drawer of a bill of exchange made it payable at his own house: Held, that the jury might fairly infer that it was an accommodation bill, which made it unnecessary to give him notice of nonpayment by the acceptor.

ASSUMPSIT by the indorsee against the drawer of a bill of exchange, accepted by one *Askew*, payable to the drawer or order, and by him indorsed to the plaintiff. Money counts and account stated. Plea, non-assumpsit. At the trial before *Littledale J.*, at the *London* sittings after *Michaelmas* term, it appeared that the bill which was in the handwriting of the defendant was made payable at his house. No evidence was given of any notice to the drawer that the bill had been dishonored, and it was thereupon objected that the plaintiff could not recover. The learned Judge thought that the circumstance, of the defendant's having drawn the bill payable at his own house, was evidence of its being an accommodation acceptance, in which case notice of dishonor was unnecessary, and he left that question to the jury, who found for the plaintiff.

Campbell now moved for a new trial, and contended that the circumstance relied upon was not evidence that the bill was accepted for the accommodation of the drawer;

drawer; and that, consequently, he was discharged by the neglect to give him notice that the bill was dishonored.

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Lord TENTERDEN C. J. I cannot understand why the drawer should, with his own hand, make the bill payable at his own house, unless he was to provide for the payment of it when at maturity. It seems to me that the point was correctly presented to the jury, and there is no reason to find fault with their verdict.

Rule refused.

Hilli. v. Bank of England & Adm. Ill 21

HILL and Another, Assignees of N. R. HOLMES, *Saturday, January 24th.*
against FARNELL.

TROVER for a parcel of books. In the first count of the declaration the books were stated to be the property of the bankrupt; and in the second, the property of the plaintiffs as his assignees. Plea, not guilty. At the trial before Lord Tenterden C. J., at the *London* sittings in *Michaelmas* term 1827, a verdict was found for the plaintiffs, for 1000*l.* damages, and costs 40*s.*; the damages, however, to be reduced and entered for 1*s.* only, upon the defendant's delivering up the books to the plaintiffs or their attorneys, in the event of the plaintiffs being entitled to hold the verdict subject to the opinion of this Court on the following case:—

On the 9th of *August* 1826, a commission of bankrupt issued against *Holmes*, under which he was duly declared

A. purchased of *B.*, a hop-merchant, a library, and paid him the value. *B.*, at that time, had committed an act of bankruptcy, of which *A.* had no knowledge: Held, that the assignees could not recover the value of the books, without at least tendering the price, inasmuch as the payment made by *A.* was declared valid by the 6 *G.* 4. c. 16. s. 82., and in order to give full effect to that enactment, *A.* must,

at least, have a lien on the books, in respect of which he had made the payment, until the assignees tendered him the sum paid.

a bank-

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a bankrupt, and the plaintiffs were chosen his assignees, and an assignment of all his estate and effects was made to them on the 8th of *September* 1826. Before and up to the time of the commission, the bankrupt carried on the business of a hop merchant in the city of *London*, and in the course of his business he had contracted some very considerable debts, and having afterwards become greatly embarrassed in his circumstances, and unable to meet his creditors, he had, during the months of *June* and *July* in the year 1826 and before, committed acts of bankruptcy by absenting himself and beginning to keep house. There was no question as to the trading, act of bankruptcy, or petitioning creditor's debt, which was on a bill of exchange. In the month of *April* 1826, one *Watson* was at the house of the bankrupt in *London* about the purchase of some hops, but which he did not buy, and whilst looking at his library there, the bankrupt asked him if he wanted to purchase some books, saying, that if he did, he should have those in his library cheap as he had bought them, but had not time to read them, and had other books at his residence in the country. *Watson*, however, declined becoming the purchaser of the books, but took a list of them, and about three months afterwards he mentioned the circumstance to the defendant, and introduced him to the bankrupt on or about the 24th of *July* 1826, the defendant having previously laid the list of books before a bookseller to settle the price for him, and Mr. *Watson's* nephew, a book collector, having also been consulted upon it. The defendant then went to the house of the bankrupt and bought his library of books for the sum of 120*l.*, and paid him that sum by a check on his banker to that amount. *Watson* had no reason to suppose

pose that the bankrupt was in difficulties, or that he had committed any act of bankruptcy whatsoever, nor had *Watson* seen or heard of him between his first interview and the time of the sale. The defendant having been examined before the commissioners under the commission, the plaintiffs read his deposition at the trial as part of their evidence, on which the defendant deposed as follows: that is to say, On the 24th of *July* 1826 I purchased some books from the bankrupt. I was introduced to him by *Mr. Watson*. I never before had any dealings with *Mr. Holmes*. At the time when I made the purchase, I received an invoice or list of the books, and I paid for them the same day by a check on Messrs. *Child and Co*. The way I came to make the purchase was as follows: “*Mr. Watson* knew that I was desirous of purchasing a library of books, and about the middle of *July* addressed a letter to me, informing me that he knew where I could make a purchase, and that he would introduce me to the party who wished to dispose of the books; and, in consequence, upon the 17th of *July*, as near as I can recollect, I met *Mr. Watson* at the corn-market, and accompanied him to *Mr. Holmes's* house in *Fenchurch Street*. I saw *Mr. Holmes's* books, and then had a list of the books given to me. I considered of the purchase during the week, and on the following *Monday* I concluded the purchase. The books were removed in a day or two afterwards. At the time I made the purchase, I understood *Mr. Holmes* carried on business as a hop merchant. I had no reason to believe he was a bookseller. I did not know at the time that *Mr. Holmes* was in embarrassed circumstances. I had not heard that he had stopped payment.” Previous to the action being commenced, viz. on the 14th of *February* 1827,

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the plaintiffs, as assignees, demanded the books in question of the defendant; but he refused to deliver them up to the assignees, and in consequence of such refusal the present action was brought. The question for the opinion of this Court was, Whether the sale to the defendant was protected under the 6 G. 4. c. 16. s. 82. The case was argued in *Easter* term 1828, by

Comyn for the plaintiffs. At the time when the books were sold to the defendant, *Holmes* had committed an act of bankruptcy, and a commission was sued out against him within two months. The property in the books vested in his assignees, by relation, from the act of bankruptcy. The sale made by the bankrupt was void, and the plaintiffs are therefore entitled to recover. It will be contended, that the case is protected by the eighty-second section of the 6 G. 4. c. 16. which enacts, that all payments really and bonâ fide made, or which shall hereafter be made to any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the persons so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed. *Cash v. Young* (a) will be relied upon by the defendant, which was decided on the 1 Jac. 1. c. 15. s. 14. That decision proceeded on the ground, that that section protected the payment of all existing debts made in the ordinary course of trade. The case of

(a) 2 B. & C. 415.

Saunderson v. Gregg (a), where Lord Tenterden C. J. held that that section protected payments only, not sales, was not cited. In *Bishop v. Crawshay* (b), *A.*, a merchant in *London*, ordered goods to be made by *B.*, a manufacturer in the country. The goods were made to order, but before they were forwarded to *A.* *B.* committed an act of bankruptcy, and afterwards shipped the goods, having previously, but after the act of bankruptcy, drawn upon *A.* a bill of exchange for a larger sum than the price of the goods ordered, which bill *A.* accepted, not then knowing that *B.* had committed an act of bankruptcy. The goods having afterwards come to the possession of *A.* it was held that the assignees were entitled to recover them, because the property in them remained in the bankrupt, both at the time when the act of bankruptcy was committed, and when the bill was accepted by *A.*; and, therefore, this was not a payment protected by the 1 Jac. 1. c. 15. s. 14., because *A.* was not a debtor of *B.* at the time when the acceptance was given." So in this case, there was not any debt, there was a mere contract of sale. There could not be any debt until the goods were delivered. The payment, therefore, was voluntary. Besides, this was not a purchase made in the ordinary course of trade. The bankrupt was a hop merchant. The subject of the purchase was books.

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Serjt. *E. Lawes* contra. In *Saunderson v. Gregg* there was no proof that the sale was *bonâ fide*. It is said that there was no debt here. The books were sold to the defendant, and he bought and paid for them.

(a) 3 Stark. 72.

(b) 3 B. & C. 415.

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rupt, the assignees can recover back the goods without offering to return the money, the payment will not be valid for any beneficial purpose to the party paying. And the only mode, therefore, in which effect can be given to the words of this section, is to hold that the party paying shall retain the goods, so long at least as he is kept out of his money. It is not necessary for us, in the present case, to say what would be the effect of an offer on the part of the assignees to return the money and rescind the sale. It will be time enough to decide that point when it shall, in fact, arise, an event not very likely to happen on a bona fide sale. The postea, therefore, is to be delivered to the defendant, and a nonsuit entered.

Judgment of nonsuit.

Saturday,
January 24th.

CLARK, Esq., Chamberlain of the City of
LONDON, against LE CREN.

A by-law, that no person shall exercise the art of a painter within the city of London, not being free of the company of painters, is a by-law in restraint of trade, and void, unless there be a special custom to warrant it.

THIS was an action of debt brought in the lord mayor's court, to recover from the defendant a penalty of 5*l.* for having used and exercised the art, trade, or mystery of a painter within the city of London, he, the defendant, not being free of the painters' company. A writ of habeas corpus directed to the mayor, aldermen, and sheriffs of London, commanding them to bring up the body of the defendant having issued; they returned, that the mayor, aldermen, and commons of the city, in common council assembled, from time immemorial have been accustomed, and of right ought to pass, make, enact, ordain, and establish in manner hereinafter mentioned, acts and ordinances for the regulation of trade within

within the said city, and the better government of certain ancient companies or corporations established for the carrying on of trade within the said city; and that the customs and privileges of the city were confirmed by a certain act of parliament passed at *Westminster* in the seventh year of King *Richard* the Second; that within the city there now is, and from time immemorial hath been, a certain ancient body corporate, called by the name of the "Master, Wardens, Assistant, and Commonalty of the Art or Mystery of Painters of the City of *London*;" that on the 23d *June* 1767, at a court of common council in the city, then holden according to the custom, &c. a certain act was then and there duly made by the mayor, &c. entitled "An Act for regulating the Masters, Wardens, Assistants, and Commonalty of the Art or Mystery of Painters of the City of *London*;" whereby after reciting, "that the freemen and citizens of the said city of the faculty, art, or mystery of painters, had full power for ever to search and govern all works and things belonging to the said mystery, and the defaults of the same works to punish and correct; that many persons at the time of making the said act, exercised the said art or mystery, and had obtained their freedoms of other companies by redemption or otherwise, by reason whereof the said company of painters were much diminished, and might fall into decay, and such persons using the said art or mystery could not be regularly searched, nor the defects, defaults, deceits, and misdemeanors in the art properly corrected;" for remedy thereof it enacted, that from the 29th of *September* 1767, every person not being already free of the city, who should exercise the art, trade, or mystery of painters within the city of *London*, or liberties thereof, should be made free of the said com-

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pany; and that no person then exercising, or who should thereafter exercise the said art or trade within the city or liberties should, after the 29th *September* 1767, be admitted by the chamberlain into the freedom of the said city, of or in any other company than the said company, any law, usage, or custom of that city, to the contrary thereof notwithstanding: Provided always, that all and every person or persons not being already free of the said city, and who then were, or thereafter should be entitled to the freedom of any other company within the city by patrimony or service, and ought, in pursuance of the said act, to be made free of the said company of painters, should be admitted into the freedom of the said company upon payment of such and the like fine and fees, and no more, as were then usually paid and payable upon the admission of the child or apprentice of a freeman of the same company. The by-law then further enacted, that if any person (other than and except such persons already free of the city), should, after the 29th *September* 1767, exercise the art of a painter within the said city, &c. not being free of the said company of painters, then every such person (except as aforesaid) should forfeit and pay the sum of 5*l.* for every such offence; and it was further enacted, that the forfeitures and penalties made payable by the said act should be recovered by action of debt, &c. to be prosecuted in the name of the chamberlain of the said city of *London* for the time being. The return then stated, that the defendant was taken and detained in prison by virtue of a plaint and action brought against him in the mayor's court of *London*, in a plea of debt for 5*l.*, the penalty imposed by the by-law. A rule nisi for a procedendo having been obtained, upon the ground that the by-law was good, and that the penalty was recoverable

verable in the mayor's court ; and, secondly, that, as the debt sought to be recovered did not exceed 5*l.*, the cause could not be removed from the inferior court ;

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C. E. Law now shewed cause. The by-law set out in the return to the habeas corpus, is a bye-law in restraint of trade ; for every person by common law has a right to set up a trade in any place. The effect of this by-law is to restrain persons from carrying on the trade of a painter. It is not even averred that the company of painters had any jurisdiction over its members ; and if it had not, the effect of the by-law cannot be to regulate the trade. Now, a by-law in restraint of trade is bad, unless it be warranted by special custom. In *Harrison v. Godman* (a), a by-law that any person who should use the trade of a butcher, not being free of the company, should forfeit 5*l.*, was held to be bad for want of a special custom to support it. In *Rex v. Harrison* (b), the same by-law was held to be good, it being shewn in the return to a mandamus that there was a special custom to warrant it. In *Wannell v. The Chamberlain of London* (c), a by-law to oblige a joiner in London to be free of the joiner's company was held good ; but there (as appears by the record (d)) the return set out a particular custom, though that fact does not appear in the report of the case in *Strange*. This distinction was recognised and acted upon in *Clark v. Compton* (e). There it was held, that the custom ought to be alleged as a fact, and that the recital of such a custom in a private act of parliament set out in the return was not sufficient. Then it is said, as the debt or duty demanded does not exceed 5*l.*, the case is within the

(a) 1 Burr. 12.

(b) 3 Burr. 1322.

(c) 1 Str. 675.

(d) See 1 Burr. 14.

(e) 7 D. & R. 597.

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statute 21 *Jac.* 1. c. 23. s. 4., and the case cannot be removed. The same objection would have applied in *Harrison v. Godman*, and *Clark v. Compton*. In the latter case it was actually made and overruled. If it be a valid objection, the plaintiff may proceed in the court below. The action is, in form, an action of debt, but substantially it is an action for breach of the by-law. It is not a case within the meaning of stat. 21 *Jac.* 1. c. 23.

Scarlett and *Campbell* contra. The return to the habeas corpus states an immemorial custom, for the common council to make by-laws for the regulation of trade, and the better government of the companies established for carrying on trade, and that this custom had been confirmed by act of parliament. This by-law was made for the regulation of the trade, and for the better government of the company of painters. The object was, that the trade itself should be regulated, and that the persons exercising it should be under the government of the company. It is a by-law made pursuant to the custom stated in the return. A custom that none but a freeman or the widow or partner of a freeman, shall sell by retail in a city, was held to be valid in *The Mayor of York v. Welbank (a)*. A by-law, warranted by such custom, would also be good. The statute 21 *Jac.* 1. c. 23. s. 2. enacts, that no writ of habeas corpus, *certiorari*, or any other writ or process other than writs of error or attain, to be sued forth out of the courts at *Westminster*, to stay or remove any action, &c. depending in any court of record within any city, &c., shall be received by the judge or officers of the inferior court, but that he may proceed with the case, unless the

(a) 4 B. & C. 438.

writ be delivered before issue or demurrer joined; and s. 4. enacts, that if any action, bill, plaint, suit, or case not concerning freehold or inheritance, or title of land, lease or rent, which shall be brought in any court of record in any city, &c. if it shall appear that the debt, damages, or things demanded shall not exceed 5*l.*, then the action shall not be stayed nor removed into the court of *Westminster* by any writ or writs. Here the demand does not exceed 5*l.* A certiorari will not lie where the inferior court has jurisdiction, and this Court have not; as where an action is brought in *London* for calling a woman a whore, or upon a custom or by-law which is suable in the inferior court. In *Watson v. Clarke (a)*, an action for calling a woman a whore having been removed by certiorari, the Court granted a *procedendo*.

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Lord TENTERDEN C. J. This case falls within the principle of the decision pronounced by this Court in *Harrison v. Godman*, and *Clark v. Crompton (b)*. In the latter case, a by-law, "That every person not being already free of the city, exercising the trade of a pewterer within the city, should be made a freeman of the company of pewterers; and that no person exercising the said trade, should be admitted by the chamberlain of the city into the freedom of any other company; and that if any person should exercise the trade of a pewterer within the city, not being free of the company of pewterers, he should forfeit 5*l.*;" was held to be a by-law in restraint of trade, and void, there not being any special custom to support it. The return in the present case does not even shew that the painter's company exercised

(a) *Carth.* 75.(b) 7 *D. & R.* 597.

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any jurisdiction over its members. This is clearly not a good by-law. Then it is said, that this cause cannot be removed from the inferior court, because the debt demanded does not exceed 5*l*. It is true that in form the action is brought to recover a debt, but in substance it is an action for breach of the by-law. I doubt whether such a case be within the act. At all events, that is no ground for our awarding a procedendo, because, if the case has not been properly removed, the plaintiff may proceed in the inferior court.

BAYLEY J. There is a well established distinction as to by-laws of this description. By common law, any person may carry on any trade in any place, unless there be a custom to the contrary, and if there be such a custom, then a by-law in restraint of trade warranted by such custom will be good ; but if there be no such custom, a by-law in restraint of trade will be bad. *Harrison v. Godman* is an authority to shew that the by-law in this case is in restraint, and not for the regulation of trade. The distinction between *Harrison v. Godman* and *Rex v. Harrison* is this. In the former case, it did not appear that there was any custom to warrant the by-law ; in the latter case it did. The same Court and the same Judges who had decided in the first case that a by-law of this description was in restraint of trade, and, therefore, void for want of a special custom to support it, held the same by-law to be good, when it was shewn that there was a special custom to support it. The return to the habeas corpus in this case, sets out a custom for the common council to make by-laws for the regulation of trade ; but the effect of the by-law in question is to prevent persons from

from carrying on trade; it operates, therefore, not merely to regulate, but to restrain trade. And inasmuch as it does not appear that there is any special custom to warrant such by-law, it is void.

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LITLEDALE J. concurred.

Rule discharged.

FERGUSON and Another *against* CARRINGTON.

In Remission of the Judgment of the Court of King's Bench, 1829.
Saturday,
January 24th.

ASSUMPSIT for goods sold and delivered. Plea, general issue. At the trial before Lord *Tenterden* C. J., at the *London* sittings after last term, it appeared that the plaintiffs, between the 29th of *March* and the 12th of *May* 1828, sold to the defendant various quantities of goods, amounting in the whole to 282*l.*, which, by the contract of sale, were to be paid for by bills accepted by the defendant; and that such acceptances were given, but had not become due at the time when the action was commenced. It appeared further, that the defendant immediately after receiving the goods sold them at reduced prices to other persons. It was contended, under these circumstances, that it was manifest that the defendant purchased the goods with the preconceived design of not paying for them; and that, as he had sold them, the plaintiffs might maintain an action to recover the value though the bills were not due. Lord *Tenterden* C. J. was of opinion, that if the defendant had obtained the goods with a preconceived design of not paying for them, no property passed to him by the contract of sale, and that it was competent to the plaintiffs to have brought trover, and to have treated

A. purchased goods upon credit, fraudulently intending at the time of the contract not to pay for them. B., the vendor, brought assumpsit for the goods sold, before the time of the credit expired: Held, that this action was not maintainable, though the vendor might have treated the contract as a nullity, and have brought trover immediately to recover the value of the goods.

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treated the contract as a nullity, and to have considered the defendant not as a purchaser of the goods, but as a person who had tortiously got possession of them; but that the plaintiffs by bringing assumpsit had affirmed that, at the time of the action brought, there was a contract existing between them and the defendant. The only contract proved, was a sale of goods on credit. The time of credit had not expired, and consequently the action was brought too soon.

F. Pollock now moved for a new trial, and contended, that the plaintiffs might sue for the price of the goods without waiting until the expiration of the credit given; that credit having been obtained in pursuance of a fraudulent design to cheat the plaintiffs.

BAYLEY J. The plaintiffs have affirmed the contract by bringing this action. The contract proved was a sale on credit, and where there is an express contract, the law will not imply one.

LITLEDALE J. At the time when this action was brought, the defendant was not bound by the contract between him and the plaintiffs to pay for the goods. The plaintiffs claim to recover for breach of the contract.

PARKE J. As long as the contract existed, the plaintiffs were bound to sue on that contract. They might have treated that contract as void on the ground of fraud, and brought trover. By bringing this action, they affirm the contract made between them and the defendant.

Rule refused (a).

(a) See *De Symons v. Minchwich*, 1 Esp. 430. *Read v. Hutchinson*, 3 Camp. 352.

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Ex parte SYLVESTER.

Monday,
January 26th.

IN *Michaelmas* term a rule nisi was obtained for a certiorari to remove into this Court a conviction, whereby it appeared, that on the 2d of *September* an information had been laid before a justice of peace against *Sylvester*, for keeping and using a gun to kill and destroy game, and negating his qualification. The conviction then stated, that *Sylvester* having been duly summoned, personally appeared on, &c. and said that he was not guilty. Whereupon one *J. G.*, a credible witness in that behalf, being duly sworn, deposed that *Sylvester*, on the 2d of *September*, not having lands, &c. nor being otherwise qualified, did keep and use a certain gun to kill and destroy the game, the same gun then and there being an engine for the killing and destroying of such game, contrary, &c.; and that the said *J. G.* saw the said *Sylvester* on the said 2d of *September* shoot a partridge with the said gun; that one *Lee* was with *Sylvester*, and did not shoot. Whereupon the said *Sylvester* said he was not guilty of the said offence, and in order to prove the same, *T. Lee* came and deposed, that on the said 2d of *September* he was seised of an estate of inheritance in possession in his own right, of the clear yearly value of 100*l.* and upwards; and that *Sylvester* was on the said 2d of *September* employed by him, *Lee*, as his servant, to accompany him into the field, sporting; and that *Sylvester*, on that occasion, shot with a gun of him, *Lee*, in his presence, and by his order and direction, and for his use, at game; and that he, *Lee*, did not shoot

An unqualified person going out with a qualified person, as his servant, and shooting game for him, is liable to the penalty imposed by the 5 Ann. c. 14. for keeping and using a gun to kill game.

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at game, or use a gun for that purpose on that day. And that he had taken out a certificate to kill game, and was qualified in his own right so to do. And that *Sylvester* shot at the partridge before mentioned as his servant, and for the use of *Lee*. Whereupon all and singular the premises being seen and fully understood, the justice adjudged that *Sylvester* be convicted,

Campbell shewed cause, and contended that *Sylvester* was properly convicted. It is clear that he was not qualified, nor was he a game-keeper appointed in pursuance of the power given to lords of manors by the 5 Ann. c. 14. s. 4. The mere presence of the master could not justify the use of a gun by him, for that cannot be considered as the act of the master.

Talfourd, contra. In *Walker v. Mills* (a) it was held, that an unqualified person who set a trap to destroy game by order of his master who was qualified, was not liable to a penalty. The principle of that case applies to the present, the only difference being, that here the party convicted used a gun instead of a trap, but both are engines for the destruction of game, and within the 5 Ann. c. 14. In *Rex v. Taylor* (b), it was held that a servant, who went coursing with his master who was qualified, could not be convicted for using dogs to kill and destroy game. And in *Lewis v. Taylor* (c), it was held that an unqualified person being out coursing with the qualified owner of greyhounds, although not his servant, and although he took an active part in the sport, was not liable to the penalties imposed by the 5 Ann. c. 14.

(a) 2 B. & B. 1.

(b) 15 East, 460.

(c) 16 East, 49.

BAYLEY J. The principle upon which those two cases proceeded, was, that the using the greyhounds was the act of the owner and master, and not of those who accompanied him. So, also, the principle of *Walker v. Mills* was, that the trap being set by the master's order, and in his presence, must be taken to have been set by him. But we cannot say, that of using the gun, neither his hand nor his skill was applied to it. If we were to hold that the firing of the gun was the act of the master, he might in the same manner use twenty guns at the same time. I think we must consider the gun to have been used by the person who actually fired it; and if so, the cases cited are inapplicable, and there can be no doubt that *Sylvester* was properly convicted.

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LITLEDALE and PARKE Js. concurred.

Rule discharged.

CROSSLEY *against* BEVERLY.

Tuesday,
January 27th.

CASE for infringing a patent. Plea, not guilty. At the trial before Lord Tenterden C. J., at the *Westminster* sittings after last *Michaelmas* term, it appeared that the plaintiff was assignee of one *Clegg*, who had obtained a patent for (amongst other things) a gas meter. Before *Clegg* took out the patent he had completed the design of his apparatus, but it had not been actually made, and between the time of taking out the patent and enrolling the specification, he made several improvements in the apparatus, although the same prin-

Where a patentee of certain gas-apparatus, between the time of taking out the patent and enrolling the specification, made certain improvements in his apparatus, and in the specification claimed the machine so improved as his invention:

Held, that this did not affect the validity of the patent.

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ciple was preserved. The specification described the apparatus so improved to be the invention claimed by *Clegg*. For the defendant it was contended, that as the patent was taken out before the machine described in the specification was perfected, the patent was void. The Lord Chief Justice overruled the objection, and the plaintiff obtained a verdict.

Brougham now moved^d for a new trial, and renewed the objection raised at the trial. He contended, that a person could not take out a patent for the idea of a machine which had not been constructed; and that it did not suffice to reduce the idea into practice between the taking out of the patent and the enrolment of the specification. Here, too, various alterations had been made in the design of the apparatus, between the taking out of the patent and the enrolment of the specification.

LORD TENTERDEN C. J. It appeared very clearly, that although Mr. *Clegg* had resorted to several contrivances for perfecting the gas meter, they were all founded upon the same principle. The objection now raised comes to this, that if a party applying for a patent has in his mind a certain invention, and afterwards and before the expiration of the time allowed for disclosing his invention, makes an improvement upon it, that shall invalidate the patent. No authority for that assertion has been quoted, and I am at a loss to know for what reason a patentee is allowed time to disclose his invention, unless it be for the purpose of enabling him to bring it to perfection. If in the intermediate time, another person were to discover the improvements
for

for so much of the machine, the patent would not be available.

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BAYLEY J. I think that the objection taken ought not to prevail, for it is the duty of a person taking out a patent, to communicate to the public any improvements that he may make upon his invention, before the specification has been enrolled.

LITLEDALE J. I am of the same opinion. It must be on some strict technical rule, that a variance between a patent and the specification is to vitiate the patent. I am not aware of the existence of such a rule, and it would be very hard, if a person were to lose the benefit of his invention because he has made it more valuable to the public.

PARKE J. Having been counsel in the cause when at the bar, declined giving any opinion.

Rule refused.

The KING *against* HALPIN.

Thursday,
January 29th.

THE defendant was brought up for judgment, having been convicted of publishing a libel, imputing to the prosecutor several indictable offences. Affidavits in mitigation of punishment were tendered, which alleged that the prosecutor had been guilty of the crimes imputed to him.

Where a party was brought up for judgment, upon a conviction of publishing a libel imputing indictable offences to an individual: Held, that affidavits affirming the truth of the libel could not be read in mitigation.

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HALPIN.

Campbell objected that such affidavits could not be received; and he relied on *Rex v. Burdett* (a), and *Rex v. Finnerty*, there cited.

Curwood and *Busby* contra, contended, that the present case differed from those cited, inasmuch as the affidavits now tendered affected the prosecutor only, who was present by his counsel. Whereas the affidavits tendered and rejected in *Rex v. Burdett*, and *Rex v. Finnerty*, imputed offences to third persons not before the Court; and they urged that such affidavits were properly admissible in mitigation of punishment, because to publish a libel of a guilty person, although not strictly justifiable, yet was a very trivial offence when compared with such an act against an innocent person.

LORD TENTERDEN C. J. The affidavits in question allege that the prosecutor has been guilty of several crimes, for any one of which the defendant ought to have prosecuted him if the charge be true. Upon the authority of the case of *Rex v. Finnerty*, I think we ought not to receive such affidavits; but the Court will receive an affidavit, stating that the defendant at the time of publishing the libel believed the charges to be true, and setting forth reasonable grounds for that belief.

BAYLEY and PARKE Js. concurred.

Affidavits rejected.

LITLEDALE J. had left the Court before the defendant was brought up.

(a) 4 B. & A. 319.

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The KING *against* BAILEY.Saturday,
January 31st.

THE defendant, a prisoner for debt, in the custody
of the marshal, being brought into Court,

Chitty moved to charge him with a writ de contumace capiendo.

A party in the custody of the marshal of the *Marshalsea* being brought into court, may be charged with a writ de contumace capiendo.

BAYLEY J. I have entertained some doubt as to whether a party in the custody of the marshal of the *Marshalsea* is chargeable with a writ de contumace capiendo. But it appears that in the case of *Rex v. Buckland* (a), the defendant was in the custody of the marshal on an excommunicato capiendo, and that this Court refused to deprive him of the rules. The writ de contumace capiendo was substituted by the 53 G. 3. c. 127. for the writ de excommunicato capiendo, and if the party might formerly be detained in the custody of the marshal under the old writ, I think he may now under that which was substituted for it.

LITLEDALE J. But for the case of *Rex v. Buckland*, I should have thought that the defendant could not be charged with this writ, the sheriff and not the marshal being the proper person to execute it.

PARKE J. I think that the case cited is a sufficient authority for the present proceeding. The party there

(a) 1 Str. 413.

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would not have been in lawful custody, unless he could be detained by the marshal under the writ de excommunicato capiendo, and no question as to his right to the rules could have been raised. Now the statute 53 G. 3. c. 127. puts the writ in question on precisely the same footing with the writ de excommunicato capiendo.

The defendant was accordingly charged with the writ.

Res. v. Subb. of Woking. 4. ad. 1820

Saturday,
January 31st.

The KING against The Trustees of the Duke of
BRIDGEWATER.

The rent is the criterion of the value of the occupation of land; and the proprietors of a canal are rateable for the sum at which it would let, and not for their gross receipts, minus their expenses.

UPON an appeal against a rate for the relief of the poor of the township of *Preston-on-the-Hill*, in the county of *Chester*, whereby the defendants were rated in the sum of 185*l.* upon the annual rental of 1480*l.*, as occupiers of land taken for the canal, towing-paths, &c. with the profits arising therefrom; and the warehouses, wharfs, clay-shed, stables, offices, gauging-docks, &c. adjacent; the sessions amended the rate, by reducing the amount of property upon which such rate was made, from the sum of 1480*l.* to 1164*l.* 15*s.* 2*d.* and confirmed the rate so amended, subject to the opinion of this Court on the following case:

The rate was duly made in point of form. The grounds of appeal were, that the principle upon which the appellants were rated was erroneous, inasmuch as it appeared they were rated in proportion to the full amount of the gross receipts as owners as well as occupiers of the rated property in the respondent township;

ship; whereas, it appeared, that the property of other inhabitants, who were occupiers of farms and premises, and who were named in the said rate, and upon whom notices, containing the grounds of appeal had been served, was rated only in proportion to the amount of the respective rents paid by them as occupiers of their farms and premises, whereby the property of the defendants in the said township was greatly over-rated, in proportion to the other property therein; and other grounds of appeal were, that the profits arising from the occupation of farms and farming stock were either improperly omitted to be assessed according to the full value thereof, or were greatly under-rated in proportion to the assessment made upon the tolls and income arising from the property of the defendants; and, lastly, that certain allowances and abatements, other than such allowances as were necessarily made to the defendants in the management of their property, for collection, repairs, and every other attendant expense, were made as far as regarded the above-mentioned persons and profits, by assessing them on the rent only, which were not made in the case of the defendants. By several acts of parliament passed in the thirty-second and thirty-third years of *George the Second*, and in the third and sixth years of *George the Third*, the late Duke of *Bridgewater* was empowered to make and extend certain canals, communicating chiefly between *Manchester*, in the county of *Lancaster*, and the river *Mersey*, at *Runecorn Gap*, in the county of *Chester*; and in consideration of the great charges and expenses to which the duke was necessarily put, these acts authorised him to receive certain tolls upon the tonnage of all coals, goods, &c. &c. which should pass along

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the canals, but exempting from toll all stones and gravel for any highway, in either of the above-mentioned counties, and all manure carried by any persons occupying lands near the said canals. The defendants are the trustees of the late Duke of *Bridgewater*, and do not any of them reside within the respondent township, but are the owners and occupiers of the canal, upon a portion of which, to the extent of one mile and three-sixteenths of a mile, passing in and through the said township, part of the above rate, amounting to 644*l.* 15*s.* 2*d.* for land taken for the canal, towing-paths, &c. with the profits arising therefrom, was made. With respect to the remaining sum of 510*l.* for warehouses, wharfs, clay-shed, stables, offices, gauging-docks, &c. adjacent, there is no question to come before the Court; the defendants derive no profit whatever from their land in the respondent township, except from the tonnage payable to them by virtue of the above-mentioned acts of parliament, but they are carriers on the canal, and receive freight for goods carried in their own vessels through the respondent township, but the tonnage duty upon the goods so carried by the defendants, is included in the above sum of 644*l.* 15*s.* 2*d.* Personal property and profits in trade are not assessed to the relief of the poor in this township. The occupiers of land and houses in the said township are rated in the present assessment, as in all former assessments, at four-fifths of their respective rents, taking those rents as the criterion of the value of the land. The full amount of the tolls arising to the appellants from the canal and towing-paths in the township, independently of their receipts as carriers for freight, but including the tolls upon the goods so carried by them, is 1272*l.* 4*s.*,
 from

from which 466*l.* 5*s.* being deducted for repairs and collection, &c., leaves the sum of 805*l.* 19*s.*, upon four-fifths of which, namely, the sum of 644*l.* 15*s.* 2*d.*, the defendants, as owners and occupiers of the part of the canal in question, were rated in respect of the tolls received or earned by them, no part of their receipts as carriers, except the tonnage on such freights, being comprised in the rate. The question for the consideration of this Court was, Whether the sum of 644*l.* 15*s.* 2*d.*, being four-fifths of the amount of the clear annual balance arising from all the tolls of the canal within the respondent township, after deducting all expenses of collection, repairs, and every other attendant expense of that description, be or be not a proper criterion of value, upon which such rates ought to have been made with reference to the profits necessarily arising from farms and other rateable property in the possession of the respective occupiers thereof, in the township, who were assessed upon four-fifths of the amount of their respective rents alone; and if this Court should be of the latter opinion, then the order of sessions to be quashed.

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Pollock and *Deacon* in support of the order of sessions. The objection made to this rate is, that the trustees are rated to the full amount of their profits; and other parties in proportion to the rent which they pay. This rate is not in fact upon the gross receipts, but there is a deduction for the expenses of collection and repairs. It will be said, that the trustees are rated for the whole profit derived from the land. There is nothing wrong in that: farmers are also rated on the same principle. [*Bayley* J. The farmer is rated on his rent, not on his

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profits. *Rex v. Attwood* (a), shews that the owner and occupier of a coal mine ought to be rated for what it would let.] The true ground for rating a farmer to the amount of his rent alone, is that his profits arise from his stock, which is not rateable. In the present case it does not appear that the property would not let for the amount on which the rent is imposed.

Sir *James Scarlett*, *Cottingham*, and *Lloyd*, *contra*, were stopped by the Court.

BAYLEY J. We have no doubt that the trustees must be rated as occupiers of land, and that the same principle of rating must be adopted whether the party be owner and occupier, or occupier only. If land be occupied by a person as a farmer, the value of the occupation is the rent paid by him for it. That, however, is not supposed to be the value of the land or of its produce, minus the expense of producing it; but the value, after deducting the expenses of cultivation, and of the farmer's subsistence. Here the rate was made upon the full amount of the gross receipts of the trustees. I do not say that that amount is wrong. The sessions, acting upon the rule now given, might perhaps come to the same conclusion. I lay out of consideration the fact of the trustees being carriers, because their occupation only is to be considered. The profits of carrying goods are the profits of their trade. The tonnage is the profit of the land occupied by them. The other sums received by them constitute the profits of their trade. The principle of our decision in this case is, that the same rule is to be applied to all occupiers, and that the rent

(a) 6 B. & C. 277.

or sum at which the land will let, is the criterion of the value of the occupation. We think this case, therefore, ought to go back to the sessions, in order that the rate may be amended.

Rate to be amended.

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OLDFIELD *against* LOWE.

Tuesday,
February 3d.

DEBT for goods sold and delivered, work and labour done and performed, materials found and provided, money paid, laid out, and expended, money lent and advanced, money had and received, and upon an account stated. Plea, the general issue. At the trial before *Holroyd J.*, at the Summer assizes for *Nottingham* 1827, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case:—The defendant, who is a silk-throwster, in *December* 1825, agreed with Messrs. *Hickson* and *Stringer*, of *Macclesfield*, machine-makers, to make part of the machinery necessary for carrying on his business. Some time after the work was begun upon, *Hickson* and *Stringer*, by deed, bearing date the 5th of *February* 1826, assigned all such work and machinery to the plaintiff for a valuable consideration. At this time the work was in an unfinished state, but money had been paid to *Hickson* and *Stringer* on account. The plaintiff, immediately upon the execution of such assignment, entered upon the work and finished it in the month of *April* following. Before the plaintiff entered upon the work, the assignment was shewn by him to the defendant, who desired him to get on with the work, and told him that

A., a silk-throwster, contracted with *B.* and *C.* for certain machinery to be made for him, and while the work was in progress, paid money on account. Before the machinery was finished, *B.* and *C.* assigned it to *D.* This circumstance was communicated by *D.* to *A.*, who said he must go on with the work, and he (*A.*) would see him paid. The machinery having been completed and delivered: Held, that *D.* might sue *A.* for the price of such parts of it as had been made by him after the assignment.

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that he would see him paid. From the time that the plaintiff entered upon the work, the wages of the workmen were regularly paid by him, and such parts of the machinery as had not been prepared by *Hickson* and *Stringer* were provided by him. In the month of *May* 1826, a commission of bankrupt issued against *Hickson* and *Stringer*, under which they were found bankrupts. The act of bankruptcy upon which the commission was issued, was alleged to have been committed on the 2d of *February* 1826, but no evidence was offered to prove an act of bankruptcy, except the depositions taken under the commission. During the time the plaintiff was finishing the work left unfinished by *Hickson* and *Stringer*, he also performed other work for the defendant, on his, the plaintiff's, own account. And after the whole was finished, the plaintiff delivered to the defendant two bills, one for the work so done on his own account, headed "Mr. *Lowe* to *Matthew Oldfield*," amounting to 9*l.* 12*s.*; the other headed, "Mr. *Lowe* to *Matthew Oldfield*, assignee of *Stringer* and *Hickson*," amounting to 528*l.* 4½*d.* On the 16th *May* 1826, the defendant received from the plaintiff the following letter, dated *Macclesfield*, *May* 15th, 1826. "Sir, — I once more take the liberty of writing respecting my own account with you, to a bill delivered, 9*l.* 12*s.* 5 pullies 3*l.* 10*s.*, runners, &c. 3*s.*, 3*l.* 13*s.* The cleavers I sent you were on my own account, as they were entered to your own account in my book, although Mr. *Clarke* erred in putting them down in the wrong bill. I particularly charged my brother to deliver them to you on my account, which he has a letter to that effect. N. B. I hope you will take into consideration the state your machinery was in when I engaged in it, as the parties

parties had then drawn more considerably than what then actually was on the premises, as you well know yourself, and as I am likely to be a great sufferer in the end, being compelled as soon as I arrived home to pay the men their wages; therefore, I hope, Sir, you will not fail in remitting me the above, as the creditors have nothing whatever to do with that. I remain, &c. *Matthew Oldfield.*"

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The defendant not having answered the above letter, he received the following letter from the plaintiff's attorney: — "Sir, unless the money you owe to Mr. *Oldfield*, of this place, is immediately paid into my hands, together with the costs of this application, I have positive instructions to proceed against you forthwith, for the recovery thereof, without further notice. *Thomas Parrott, Macclesfield, 25th May 1826.*"

The money not being paid, an action was soon after commenced by the plaintiff against the defendant, and the sum of 28*l.* 5*s.* 7*d.* paid to the plaintiff's attorney, Mr. *Parrott*, for the debt therein. The costs were afterwards paid. On the 5th *May* 1826, notice was given by the assignees under *Hickson* and *Stringer's* commission to the defendant, not to pay the money for the work done by the plaintiff in completion of that begun by Messrs. *Hickson* and *Stringer* to any person but them, and the balance due for the work, materials, and wages, done, found, and paid, in the execution of the work and machinery, as well by the plaintiff as by *Hickson* and *Stringer*, was in *July* 1826 paid by defendant to their assignees.

Fynes Clinton for the plaintiff. At the trial, an attempt was made to shew an act of bankruptcy committed by *Hickson* and *Stringer* on the 2d of *February*, before

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before the assignment, but there was no evidence of that, except the proceedings under the commission. Such evidence was insufficient, the assignees not being parties to the action, *Doe d. Mawson v. Liston*(a). The case must therefore be considered as if no bankruptcy had intervened. There can be no doubt, that, as against *Hickson* and *Stringer*, the plaintiff is entitled to the money in dispute; the only question is, whether he could sue for it in his own name? He might do so, for this was not an assignment of a chose in action, but an agreement that the plaintiff should finish certain work which they, *Hickson* and *Stringer*, had commenced. The defendant, by allowing the plaintiff to complete it, adopted him as the contractor, instead of *H.* and *S.*, and must therefore pay him. The promise to see the plaintiff paid, is not within the statute of frauds, s. 4., for the defendant was the principal debtor, and not a party promising to be answerable for the debt or default of another.

Reader contra. The defendant was no party to the assignment by *H.* and *S.* to the plaintiff. If the work had been improperly done, or not done in time, he might have sued them. Neither was the defendant discharged by them from his obligation to pay them for the machinery. [Lord *Tenterden* C. J. Could they claim against their own act?] As against the defendant, who was no party to it, they might. The plaintiff merely became their agent to execute the work, and derived from that arrangement no legal claim upon the defendant. If so, *H.* and *S.* were primarily bound to pay him, and the defendant's promise to see him paid, was a collateral undertaking to pay, if *H.* and *S.* failed

(a) 4 Taunt. 741.

to do so; it was, therefore, within the fourth section of the statute of frauds, and void for want of a memorandum in writing. The separate accounts delivered by the plaintiff shew, that he thought he had no right to claim payment for the machinery except as assignee of *H. and S.*

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LORD TENTERDEN C. J. I am of opinion that the plaintiff is entitled to recover. The alleged act of bankruptcy may be laid out of the question. The case then stands thus; *H. and S.* entered into an agreement with the defendant to make certain machinery for him. Part of the work was performed, and part of the money paid. Finding that they were not in a situation to complete their undertaking, *H. and S.* assign the work and machinery to the present plaintiff. By law that was not valid, so as to enable the plaintiff to recover for that part of the work which had been previously done. The defendant, however, was made acquainted with the assignment. He might have insisted that he would look to *H. and S.* for the completion of their contract, but that was not his language. On the contrary, he says to the plaintiff, "Go on with the work, and I will see you paid," clearly meaning, "and I will pay you." The legal effect of that was, to make a contract with the plaintiff for all the work that remained to be done. Reliance has been placed on the defendant's letter, distinguishing his own account from this claim, which he seems to think doubtful. But his doubts as to the legality of the claim cannot prevent his recovering, any more than his confidence in the justice of it could have aided him.

LITTTLEDALE J. concurred.

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PARKE J. Until the machinery contracted for was completed and delivered, the property remained in the makers; and, therefore, until it had been so completed and delivered, *Hickson* and *Stringer* could have no legal claim upon the defendant. On the 5th of *February* they assigned the machinery in an unfinished state to the plaintiff. He applied to the defendant, who desired him to go on with it. The property in the machinery was then the plaintiff's; at the defendant's desire that machinery was completed and delivered to him; he is, therefore, clearly bound to pay the plaintiff for it,

Postea to the plaintiff (a).

(a) See *Atkinson v. Bell*, ante, 277.

Smith. v. Anderson 7 C.B.21,

Friday,
February 6th.

THOMSON against DAVENPORT and Others.

(In Error.)

At the time of making a contract of sale, the party buying the goods represented that he was buying them on account of persons resident in *Scotland*, but did not mention their names, and the seller did not enquire who they were, but afterwards debited the party who purchased the goods: Held, that the seller might afterwards sue the principals for the price.

THIS was a writ of error, brought upon a judgment obtained in the borough court of *Liverpool* against the plaintiff in error. The plaintiff below declared for goods sold and delivered. Plea, general issue. Upon the trial before the mayor, and bailiffs, assisted by the recorder, a bill of exceptions was tendered to the direction given by the mayor, bailiffs, &c. by the said recorder to the jury. The bill of exceptions stated, that one *Thos. M'Kune* was produced and examined upon oath as a witness by the counsel for the plaintiffs, to maintain the issue on their parts. And *M'Kune* stated in evidence, that he, *M'Kune*, was established in *Liverpool* as a general *Scotch* agent, and, amongst others, acted as agent for the defendant, who resided in *Dumfries*; that,

in

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and rendered invoices thereof to *M'Kune*, headed thus:
 " Mr. *Thomas M'Kune* bought of *John and James Davenport*" (which was the plaintiffs' firm); that *M'Kune* entered the net amount (193*l.* 7*s.* 8*d.*) to the credit of the plaintiffs in an account with them in his books, and charged the same sum, with the addition of 2 per cent. for the commission, to the debit of the defendant in an account with him, which was according to his invariable course of dealing; and that he sent to the defendant a general invoice of all the goods purchased, comprising the glass and earthenware, but not mentioning the plaintiffs' names; that afterwards, in *April* 1823, and before the credit for the goods had expired, *M'Kune* became insolvent, though up to the day of his stopping payment he was in good credit, and could have bought goods on trust to the amount of 20,000*l.*; whereupon the said mayor and bailiffs, by the said recorder, after stating the evidence, told the jury that, from the distance of time since the sale took place, there was some uncertainty in the evidence of *M'Kune* as to the precise words used by him to the plaintiffs at the time he gave them the order for the goods; but it appeared to them (the said recorder) upon the evidence, that the name of the defendant as principal was not then communicated or known to the plaintiffs; and directed the jury, that if they were of opinion that the defendant's name as principal was mentioned by *M'Kune* to the plaintiffs at the time the order was given, or that the plaintiffs then knew that the defendant was the principal, their verdict ought to be for the defendant; but if they were of opinion that the defendant's name as the principal was not mentioned by *M'Kune* to the plaintiffs at the time of the order being given, and that the plaintiffs did not
 then

in *March* 1823, he received from the defendant a letter, containing an order to purchase various goods, and, amongst others, a quantity of glass and earthenware; which letter, with the order, was produced by the plaintiffs' attorney, and was read in evidence as follows:—

"*Dumfries*, 29th *March* 1823. Annexed is a list of goods which you will procure and ship per *Nancy*. Memorandum of goods to be shipped: twelve crates of *Staffordshire* ware, crown window glass, ten square boxes," &c. &c. That he, *M'Kune*, provided himself with the goods mentioned in this letter, and that he got the glass and earthenware from the plaintiffs, who were glass and earthenware dealers in *Liverpool*; that at the time he ordered the glass and earthenware, he saw the plaintiff, *Mountford Fynney*, himself, and, to the best of his recollection, told him, that he, *M'Kune*, had an order to purchase some goods, and that they were the same house for whom he had purchased goods from the plaintiffs the preceding year; and he also stated, to the best of his recollection, that as he was a stranger to the nature of the goods, he hoped that the plaintiffs would let him have the same as before, to save him from blame by his employer;" but he, *M'Kune*, did not shew the plaintiffs the letter containing the order, nor did he mention the name of any principal; that he then either gave the plaintiff, *Mountford Fynney*, a copy of the order, or produced to him the original order, that *Fynney* might himself take a copy, but he rather thought the former was the fact, and that the plaintiff *Fynney* did not see the original, though he could not say positively; that the plaintiff accordingly furnished the glass and earthenware, the amount of which, deducting the discount, was 193*l.* 7*s.* 8*d.*, but adding the discount, 219*l.* 10*s.*, and

then know that the defendant was the principal, and they did not think, upon all the said facts of the case, that the plaintiffs at the time of the order being given knew who the principal was, so that they then had a power of electing whether they would debit the defendant or *M'Kune*, they ought to find a verdict for the plaintiffs; and that, although the plaintiffs at the time of the sale might think that *M'Kune* was not buying the goods upon his own account, yet if his principal was not communicated or made known to them, that circumstance ought to make no difference in the case. The jury, after finding as a fact that the letter containing the order was not shewn and made known to the plaintiffs, gave their verdict for the plaintiffs below for 219*l.* 10*s.* It was contended, that the mayor and bailiffs, by the recorder, ought to have directed the jury that if they were satisfied that *Davenport*, &c. at the time of the order being given knew that *M'Kune* was buying the goods as an agent, even though his principal was not communicated or made known to them, they, by afterwards debiting *M'Kune*, and so rendering the said invoices, had elected to take him for their debtor, and had precluded themselves from calling on *Thomson*.

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Joy for the plaintiff in error. *Davenport* and Co., the sellers of these goods, knowing that *M'Kune* was an agent, and electing to take him as their debtor, cannot now resort to *Thomson*. The two following propositions will not be disputed. Where the seller of goods, knowing that the buyer, though dealing in his own name, is, in truth, the agent of another, elects to give the credit to such buyer, he cannot afterwards recover

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their value from the principal. On the other hand, if the seller be ignorant at the time of the sale that the purchaser is buying for another person, that person may be sued, unless where the seller may have abandoned his right to resort to him. Of these two propositions, the first is absolute; the second conditional. It will be contended, that this is an intermediate case, and altogether new. But it clearly falls within the first of the above propositions; or, if it can be said to range between them at all, it is not equidistant, but approximates to the first more nearly than to the second. Or, thirdly, if it were practicable to force it nearer to the second, this case would clearly fall within the condition. Here the sellers were distinctly informed, that the buyer was in truth the agent of another, and yet they elected to give credit to such agent. They have, therefore, thus precluded themselves from recovering over against the principal. They chose to treat the agent as their debtor, with a full knowledge that the goods were for another. They were so satisfied to have the agent for their debtor, that they did not even ask the name of his principal. It was natural they should prefer him to a house at *Dumfries*, the members of which resided out of the reach of the laws of *England*. It will be said, that they could not elect to take him as their debtor, because the name of the principal was not mentioned. But that was the fault of the sellers: they did not ask the name. They were told the goods were for a house at *Dumfries*. There was no attempt at concealment on the part of the buyer. If they had not fully decided, at the time of making the contract, to prefer *M'Kune* to any house in *Dumfries*, they would surely have enquired for *what* house he was acting.

This

This omission made their preference of him manifest. They knew not only that *M'Kune* was buying for another, but they knew also the description of that other, viz. a house in *Dumfries*. Beyond this, what was there in the name? Or, if any thing worth their knowing, their ignorance of it was solely imputable to their own laches. Caveat venditor. If they wilfully closed their eyes against further light *then*, they cannot *now* complain that it was imperfect. But they had abundant information whereon to exercise an election, and by their conduct they have shewn that they preferred to take *M'Kune* as their debtor. The name of the principal is wholly immaterial, if the sellers, knowing that there is a principal, elect to take the agent as their debtor. If this case, therefore, come nearer to the second proposition, the sellers must be held to have abandoned their right to resort to the principal. This doctrine is fully established by *Paterson v. Gandassequi* (a), and *Addison v. Gandassequi* (b); and partially confirmed by *Maanss v. Henderson* (c), where it was held to be a sufficient intimation of the agent's character, that he, in time of war, described a ship as neutral. It is consonant to the general principle of the law merchant, as evinced by its admission in the case of foreign principals. And as, in respect to the difference of courts and the difficulties of executing process, a *Scotchman* domiciled in *Dumfries* stands much in the same position as a foreigner, the same rule should hold as to both. In point of law, therefore, this doctrine is consistent with the decisions in analogous cases; in point of commercial

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(a) 15 *East*, 62.(b) 4 *Tount.* 574.(c) 1 *East*, 353.

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policy, it is expedient; and in point of equity, between these parties, it is just.

Patteson contra. It is undoubtedly established by the authorities, that if the seller knows that there is a principal, and also who that principal is, and afterwards gives credit to the agent, he thereby makes his election, and abandons his right to resort to the principal. But, in this case, the seller did not, either at the time of the sale or at the time when he gave credit to the agent, know the name of the principal; he had not, therefore, the power of making any election. This case, therefore, does not fall within the authorities cited. On the other hand, it is clearly established, that if the seller does not at the time of the sale know that the buyer is an agent, he may when he discovers the fact, sue the principal, although in the meantime he has given credit to the agent. The present is an intermediate case, for here the seller knew at the time of the sale that the buyer was an agent, but did not know for whom he was agent. The seller was not bound to enquire the name of the principal; and therefore this case belongs to the latter, rather than the former class. The seller cannot make his election between the agent and principal until he knows who the principal is; for the election implies a comparison of their individual credit. The right to resort to the principal could be determined only by reason of the seller having exercised an election, and that right was not put an end to in this case, because no election was or could be exercised. Neither is the buyer injured by the seller suing the principal; the credit had not expired when the action was commenced, nor had the buyer settled any account with his principal. The
buyer,

buyer, therefore, is not in a worse situation than he was before. *Wilson v. Hart* (a), and *Seymour v. Pychlau* (b), shew that the rule, as to discharging the principal, is not to be extended. As to the argument from inconvenience, if an unknown principal is not to be liable when discovered, great inconvenience will follow. The majority of contracts are made by agents who are known to be agents, but the names of their principals are not known. In *Moore v. Clementson* (c) it was held, that although a factor sells goods as a principal, yet, if, before they are all delivered, and before any part of them is paid for, the purchaser is informed that they belong to a third person, in an action by the latter for the price of them, the purchaser cannot set off a debt due to him from the factor. Lord *Ellenborough* there says, "A man who is in the habit of selling the goods of others, may likewise sell goods of his own; and where he sells goods as a principal, with the sanction of the real owner, the purchaser, who is thus led to give him credit, shall on no account afterwards be deprived of his set-off by the intervention of a third person. But here there was express notice to the purchaser, before the contract was completed, that *Green*, in this particular transaction, acted only as a factor." In *Railton v. Hodgson* (d), the sellers gave credit to *Smith, Lindsay, and Co.*; but it was held, they might maintain an action against the defendant, who had had the goods. The defendant here has had the goods, and in justice ought to pay for them, unless the plaintiff has done any thing to preclude himself from suing, or unless it be shewn that by suing the defendants he is altering the rights of other parties, and neither of those things can be shewn.

(a) 7 *Tamr.* 296.(b) 1 *B. & A.* 14.(c) 2 *Campb.* 22.(d) Cited in *Paterson v. Gandassequi*, 15 *East*, 64.

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Lord TENTERDEN C.J. I am of opinion that the direction given by the learned Recorder in this case was right, and that the verdict was also right. I take it to be a general rule, that if a person sells goods (supposing at the time of the contract he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if at the time of the sale the seller knows, not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him and him alone, then, according to the cases of *Addison v. Gandassequi* (a), and *Paterson v. Gandassequi* (b), the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other. The present is a middle case. At the time of the dealing for the goods, the plaintiffs were informed that *McKune*, who came to them to buy the goods, was dealing for another, that is, that he was an agent, but they were not informed *who* the principal was. They had not, therefore, at that time the means of making their election. It is true that they might, perhaps, have

(a) 4 Taunt. 574.

(b) 15 East, 62.

obtained those means if they had made further enquiry; but they made no further enquiry. Not knowing who the principal really was, they had not the power at that instant of making their election. That being so, it seems to me that this middle case falls in substance and effect within the first proposition which I have mentioned, the case of a person not known to be an agent; and not within the second, where the buyer is not merely known to be agent, but the name of his principal is also known. There may be another case, and that is where a *British* merchant is buying for a foreigner. According to the universal understanding of merchants, and of all persons in trade, the credit is then considered to be given to the *British* buyer, and not to the foreigner. In this case, the buyers lived at *Dumfries*; and a question might have been raised for the consideration of the jury, Whether, in consequence of their living at *Dumfries*, it may not have been understood among all persons at *Liverpool*, where there are great dealings with *Scotch* houses, that the plaintiffs had given credit to *M'Kune* only, and not to a person living, though not in a foreign country, yet, in that part of the king's dominions which rendered him not amenable to any process of our courts? But, instead of directing the attention of the Recorder to any matter of that nature, the point insisted upon by the learned counsel at the trial was, that it ought to have been part of the direction to the jury, that if they were satisfied the plaintiffs, at the time of the order being given, knew that *M'Kune* was buying goods for another, even though his principal might not be made known to them, they, by afterwards debiting *M'Kune*, had elected him for their debtor. The point made by the defendant's counsel,

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therefore, was, that if the plaintiffs knew that *M^r Kune* was dealing with them as agent, though they did not know the name of the principal, they could not turn round on him. The Recorder thought otherwise: he thought that though they did know that *M^r Kune* was buying as agent, yet, if they did not know who his principal really was, so as to be able to write him down as their debtor, the defendant was liable, and so he left the question to the jury, and I think he did right in so doing. The judgment of the court below must therefore be affirmed.

BAYLEY J. There may be a course of trade by which the seller will be confined to the agent who is buying, and not be at liberty at all to look to the principal. Generally speaking, that is the case where an agent here buys for a house abroad. There may also have been evidence of a course of trade, applicable to an agent living here acting for a firm resident in *Scotland*. But that does not appear to have been made a point in this case, and it is not included in the objection which is now made to the charge of the Recorder. In my opinion, the direction of the Recorder was right; and it was, with the limits I have mentioned, perfectly consistent with the justice of the case. Where a purchase is made by an agent, the agent does not of necessity so contract as to make himself personally liable; but he *may* do so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable, if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of accounts between the agent here and the principal would

would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent. But the seller, who knows who the principal is, and instead of debiting that principal, debits the agent, is considered, according to the authorities which have been referred to, as consenting to look to the agent only, and is thereby precluded from looking to the principal. But there are cases which establish this position, that although he debits the agent who has contracted in such a way as to make himself personally liable, yet, unless the seller does something to exonerate the principal, and to say that he will look to the agent only, he is at liberty to look to the principal when that principal is discovered. In the present case the seller knew that there was a principal; but there is no authority to shew that mere knowledge that there is a principal, destroys the right of the seller to look to that principal as soon as he knows who that principal is, provided he did not know who he was at the time when the purchase was originally made. It is said, that the seller ought to have asked the name of the principal, and charged him with the price of the goods. By omitting to do so, he might have lost his right to claim payment from the principal, had the latter paid the agent, or had the state of the accounts between the principal and the agent been such as to make it unjust that the former should be called upon to make the payment. But in a case circumstanced as this case is, where it does not appear but that the man who has had the goods has not paid for them, what is the justice of the case? That he should pay for them to the seller or to the

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the solvent agent, or to the estate of the insolvent agent, who has made no payment in respect of these goods. The justice of the case is, as it seems to me, all on one side, namely, that the seller shall be paid, and that the buyer (the principal) shall be the person to pay him, provided he has not paid any body else. Now, upon the evidence, it appears that the defendant had the goods, and has not paid for them either to *M'Kune* or to the present plaintiffs, or to any body else. He will be liable to pay for them either to the plaintiffs or to *M'Kune's* estate. The justice of the case, as it seems to me, is, that he should pay the plaintiffs who were the sellers, and not any other person. I am, therefore, of opinion that the direction of the Recorder was right.

LITLEDALE J. The general principle of law is, that the seller shall have his remedy against the principal, rather than against any other person. Where goods are bought by an agent, who does not at the time disclose that he is acting as agent; the vendor, although he has debited the agent, may upon discovering the principal, resort to him for payment. But if the principal be known to the seller at the time when he makes the contract, and he, with a full knowledge of the principal, chooses to debit the agent, he thereby makes his election, and cannot afterwards charge the principal. Or if in such case he debits the principal, he cannot afterwards charge the agent. There is a third case; the seller may, in his invoice and bill of parcels, mention both principal and agent: he may debit *A.* as a purchaser for goods bought through *B.*, his agent. In that case, he thereby makes his election to charge the principal, and cannot afterwards resort to the agent.

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The general principle is, that the seller shall have his remedy against the principal, although he may by electing to take the agent as his debtor, abandon his right against the principal. The present case differs from any of those which I have mentioned. Here the agent purchased the goods in his own name. The name of the principal was not then known to the seller, but it afterwards came to his knowledge. It seems to me to be more consistent with the general principle of law, that the seller shall have his remedy against the principal, rather than against any other person, to hold in this case that the seller, who knew that there was a principal, but did not know who that principal was, may resort to him as soon as he is discovered. Here the agent did not communicate to the seller sufficient information to enable him to debit any other individual. The seller was in the same situation, as if at the time of the contract he had not known that there was any principal besides the person with whom he was dealing, and had afterwards discovered that the goods had been purchased on account of another; and, in that case, it is clear that he might have charged the principal. It is said, that he ought to have ascertained by enquiry of the agent who the principal was, but I think that he was not bound to make such enquiry, and that by debiting the agent with the price of the goods, he has not precluded himself from resorting to the principal, whose name was not disclosed to him. It might have been made a question, whether it was not a defence to this action that the principal resided in *Scotland*. But that was not a point made at the trial, nor noticed in the bill of exceptions; we cannot, therefore, take it into our

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consideration. For the reasons already given, I think the plaintiff is entitled to recover.

Judgment affirmed.

PARKE J., having been concerned as counsel in the cause, gave no opinion.

10/ See Roberts. v. Handcock 3 B. & Ald. 404

Friday,
February 6th.

SINCLAIR and Another *against* BOWLES. /a/

Where *A.* undertook, for a specific sum of money, to repair and make perfect a given article, then in a damaged state, and did repair it in part, but did not make it perfect; it was held, that he could not, in an action of assumpsit, recover for the value of the work done and materials found.

THIS was an action of assumpsit for work and labour done, and materials found and provided, and goods sold, &c. brought by the plaintiffs, who were glass-cutters and benders, against the defendant, who was a tavern-keeper. At the trial before *Parke J.*, at the *London* sittings in this term, the plaintiffs proved that they had repaired three glass chandeliers for the defendant, and that 10*l.* was a reasonable price for the work done, and materials provided. On the part of the defendant it was proved, that in *April* last one of the plaintiffs called upon him, and asked if he wanted any new chandeliers; the defendant said he did not, but that he wanted some old ones repaired: he desired the plaintiff to look at them minutely, and to say what he could do them for. The plaintiff at first said he would do them for 8*l.* The defendant observed, that a great deal must be done to them, that three arms were wanting, and that if the plaintiff would do them complete, so as to look well, he would give 10*l.* The plaintiff then looked at them again, and said he would make them complete for that sum. On the following day the plaintiff

plaintiff came to take them away; and the defendant then told him not to take them away unless he would make them complete for the 10*l*. The plaintiff took them away. They were brought back in a few days. They had been cleaned, and some icicles and drops supplied, but they were not in a perfect state. One of the arms, which was perfect when it was taken away, was broken, and several of the spangles and icicles damaged; and, in one of the chandeliers, the scroll, which had been sent damaged, was brought back in the same state. Upon this the defendant refused to give the plaintiff an order for the money. It was contended, on the part of the plaintiffs, that even if the jury believed the evidence given on the part of the defendant, the plaintiffs were entitled to recover for the work actually done, and materials provided for the chandeliers. The learned Judge was of opinion that the contract between the parties was entire, and that the plaintiffs were not entitled to recover at all, unless they had made the chandeliers perfect, according to the contract; but, in order to save expense to the parties, he left it to the jury, upon the evidence, to say, first, Whether the contract had been substantially completed, according to the intention of the parties? And, if it had not, secondly, Whether the defendant had derived any benefit, and to what amount, for the work done? The jury found first, that the contract had not been performed; and, secondly, that the defendant had derived benefit from the work done, to the amount of 5*l*. The learned Judge then directed a nonsuit, but reserved liberty to the plaintiffs to move to enter a verdict for 5*l*.

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Gurney now moved accordingly. The defendant, having derived benefit from the work done by the plaintiffs, is in justice bound to pay for it. [*Bayley J.* The contract was entire—the defendant having never been discharged from his obligation to complete it.] Where an entire contract for goods is performed in part, and some of the goods have been delivered, and the vendee does not return them upon the failure of the vendor to perform his part of the contract, the vendor may bring an action for the value of the goods delivered, although he is liable to a cross action for the breach of his contract. Here the plaintiff not only cleaned the chandeliers, but he provided icicles and drops: the things so provided ought to have been returned.

Lord TENTERDEN C. J. The plaintiff ought to have demanded those articles. The contract between the parties was, that the plaintiff should make the chandeliers perfect for 10*l*. The plaintiff has not performed his part of the contract, and cannot, therefore, recover any thing in this form of action.

Rule refused (*a*).

(*a*) *Shipton v. Casson*, 5 *B. & C.* 578.

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The KING *against* The Company of Proprietors *Saturday,*
of the MERSEY and IRWELL Navigation. *February 7th.*

UPON appeal against an assessment made by the churchwardens and overseers of the poor of the township of *Barton-upon-Irwell*, in the county of *Lancaster*, for the relief of the poor of the said township, whereby the defendants were rated as owners and occupiers on an annual charge of 2908*l.* 7*s.* 6*d.*, for land taken and used for the *Mersey and Irwell navigation, towing-paths, locks, and tonnage arising therefrom*. The sessions amended the rate, by reducing the sum of 2908*l.* 7*s.* 6*d.* to 2600*l.*, upon the ground that the amount of tonnage was overvalued, subject to the opinion of this Court on the following case:—

By an act of 7 G. 1., entitled “An act for making the rivers *Mersey* and *Irwell* navigable from *Manchester* to *Liverpool*, in the county of *Lancaster*,” certain persons therein nominated as undertakers, their heirs and assigns, were authorized, at their proper costs and charges, to make the rivers *Mersey* and *Irwell* navigable and passable for boats, barges, lighters, and other vessels, from *Liverpool* to *Hunt’s Bank*, in *Manchester*; and to maintain and use such navigation by themselves or others, in such manner in, by, through, and upon the said rivers, as they should think fit; and for those purposes

By an act of parliament, certain persons were authorised to make the rivers *Mersey* and *Irwell* navigable from *L.* to *H.*, and to maintain such navigation; and, for those purposes, to clear, cleanse, scour, open, enlarge, or straighten the river, and to dig and cut the banks, and to make new cuts, trenches, or passages for water through lands adjoining, and to build bridges, sluices, locks, &c., and to do all other things necessary for making and maintaining the navigable passage, first giving satisfaction to the owners of lands; and, in consideration of the expenses to be incurred, the undertakers were authorised

to take for their own proper use and behoof certain tolls. The undertakers made the river navigable, scoured and cleansed the same, and purchased lands for towing-paths and cuts: Held, that they were not liable to be rated to the poor for land taken for the purpose of the navigation, because they were not occupiers of that land, but had a mere easement in it; secondly, that they were liable to be rated for the new cuts; thirdly, that they were liable to be rated for the weirs, locks, and dams erected on their own lands.

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to clear, scour, open, enlarge, or straighten the rivers *Mersey* and *Irwell*, and to dig or cut the banks thereof; and to make any new cuts, trenches, or passages for water, in or through the lands and grounds adjoining or near unto the said rivers, or either of them, as should be necessary for the navigation of boats and other vessels, and any way necessary for the convenient carrying on and effecting the said undertaking, were it the soil or ground of his majesty, or of any other person whatsoever; and, if necessity required, to cut and remove trees, gravel beds, &c. which might hinder the navigation; and to build and erect on or over the said rivers or lands adjoining or near to the same, or the said new cuts, trenches, or passages so to be made, such and so many bridges, sluices, locks, wears, and other works as should be necessary, where they should think fit, and to alter, repair, increase, enlarge, and amend the same; to make and use necessary ways and passages for carrying goods, &c. upon, to, or from the said rivers, passages, trenches, or cuts; to amend, heighten, or alter any bridges, or to turn or alter any highways in, upon, or near to the said rivers, cuts, &c.; and to pull down, alter, or demolish any mill, wear, or other obstruction upon or contiguous to the rivers, cuts, &c.; to set out and make towing-paths for towing boats and other vessels passing in or upon the said rivers or cuts, &c.; and to do all other things necessary for making and maintaining the navigable passage of the rivers, or for the improvement thereof, the undertakers or their heirs doing as little damage as might be; first giving *satisfaction* to the respective owners of such mills, wears, lands, tenements, or hereditaments as should be pulled down, demolished, altered, dug up, cut, removed,

moved, or otherwise made use of or damaged by carrying on or maintaining the navigation. And it was further enacted, that in consideration of the great charges and expenses the undertakers, their heirs or assigns, would be at, not only in making the rivers navigable, but also in making, erecting, repairing, cleansing, maintaining, keeping up, and continuing the wears, works, locks, dams, sluices, bridges, and other matters necessary to be made as aforesaid, it should be lawful for them, &c. and no others, at all times thereafter to demand, receive, recover, and take *for their own proper use and behoof*, in respect of their charges and expenses aforesaid, for all and every such coal, cannel, stone, timber, and other goods and commodities whatsoever, as should be carried or conveyed in any boat, barge, lighter, or other vessel in, upon, to, or from any part of the said rivers *Mersey and Irwell*, between *Bank Key* and the said place called *Hunt's Bank*, in *Manchester* aforesaid, such rates and duties for tonnage, over and besides what should be paid for freight or carriage of the said goods, as the undertakers, &c. should think fit, not exceeding 3s. 4d. for every ton of such coal, cannel, &c.; and so proportionally for every greater or less quantity or weight, the same rates and duties to be paid at such places near to the said river, and in such manner as the undertakers, &c. think fit. And, after reciting that it would be necessary in some places to haul and tow, up and down the said rivers, boats and other vessels by the strength of men, horses, engines, and other means, it was further enacted, that it should be lawful for the undertakers, &c. to set up, and for their boatmen, &c. passing or navigating in or upon

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the said rivers, or in or upon any cuts, streams, or passages that should be made use of as aforesaid, winches and other engines in convenient places; and by and with the same, by strength of men, horses, or beasts going upon the said banks or lands near to the said rivers, streams, cuts, or passages in convenient manner, without the let or hinderance of any persons whatsoever, to draw, tow, or haul, up or down the said rivers, barges, boats, lighters, and other vessels. And it was thereby further enacted, that they should (where wanting), at their own costs and charges, make, set up, and from time to time maintain, convenient gates and bridges, passages, and stiles in all the hedges and fences in the towing-paths to be set out as aforesaid, and over the new cuts, trenches, and passages for water so to be made, where necessary for the occupiers of lands, tenements, and hereditaments thereunto adjoining, to come at their lands for the use and occupation of the same, in such manner as the commissioners appointed by that act should order and direct. And it was further enacted, that if they, &c. should, in pursuance of the powers given by the said act, raise the water in the rivers *Mersey* and *Irwell* above its ancient or usual height, whereby the adjacent lands might be more liable to be overflowed or damaged than they had formerly been, that then they should, at their own proper costs and charges, from time to time cause the banks of the said rivers, and of all such streams, trenches, or brooks as come into the said rivers, or either of them, to be proportionally raised, heightened, and strengthened where need should require, so as the two banks should be able to contain the water at such its raised height; and also should maintain

tain and repair the banks as often as occasion should require ; and if they, in pursuance of the powers aforesaid, should make any cuts, trenches, or passages for water, by reason whereof, or if by means of the navigation to be made as aforesaid, any persons should not have convenient ingress or egress into or out of their lands, tenements, or other hereditaments, as they before that time had, or as occasion should require, then the undertakers should, at their own proper costs and charges, make, erect, and maintain such sufficient bridges or other sufficient passages over or near to every such new cut, &c. as by the said commissioners should be directed. And it was further enacted, that the said rivers *Mersey* and *Irwell* for ever thereafter should be esteemed navigable from *Liverpool* to *Hunt's Bank* in *Manchester*, and that all the king's subjects, with their goods and merchandize, might have their free passage upon the said rivers, or any part thereof, between *Liverpool* and *Hunt's Bank*, with boats and other vessels, and all necessary and convenient liberties for navigating the same without any hinderance from any persons whatsoever, paying such rates or duties as were appointed by that act to be paid to the undertakers, their heirs or assigns. And, after reciting that the river *Mersey* had been theretofore and then was navigable from *Liverpool* to *Bank Key*, it was further enacted, that all goods, &c. (as theretofore the same had been) should be and remain free from paying any toll, duty, or tonnage to the undertakers, their heirs and assigns, between *Liverpool* and *Bank Key*. And by another act of parliament, of the 4 G. 3., the then proprietors and undertakers were incorporated by the name of "The Company of Proprietors of the *Mersey*

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and *Irwell Navigation*," and invested with the same powers as were given by the former act.

The appellants and the undertakers, from whom they derive their title, have at very heavy costs and charges, and in pursuance of the powers granted to them by the act, made and maintained, and still do maintain and continue navigable the said rivers from *Liverpool to Manchester*. They have made (and kept in order, by repairing with gravel and sand,) towing-paths by the side of the whole line of the navigation, by cutting away the brows, levelling of the lands, and erecting bridges over brooks and ditches crossing the towing-paths; *they pay rent for the towing-paths along some parts of the line*; wherever they have not bought land, they pay rent for the towing-paths. The towing-paths are not fenced off from the adjoining land except in a few places, and in these instances the fences have been made, and are maintained by the owners of the adjoining land, and not by the appellants. But gates have been erected by the company at the fences between adjoining fields, where the land-owners have required it to prevent cattle trespassing, and such gates are maintained by the appellants. The banks between the river and the towing-path have been repaired sometimes by the appellants, but chiefly by the land-owners; who have, in that case, been supplied by the appellants with stone and materials at a low price to induce them to make such repairs. When the navigation is impeded, the appellants scour and dredge the river, applying the gravel and sand so taken out to the repairs of the towing-paths, and selling the surplus when they have more gravel or sand than is necessary for that purpose. In several parts of the navigation,

navigation, the appellants have made new navigable cuts, connecting different parts of the river: three such cuts of the breadth of eight yards each, and being altogether 938 yards in length, have been made, and are now used by the appellants in the township of *Barton-upon-Irwell*. The land necessary for these cuts belongs to the appellants, and was taken by them under the powers of the act, and compensation made to the land-owners pursuant thereto. The length of the navigation within the township of *Barton-upon-Irwell* is nine miles seven furlongs.

Six miles and a half of the towing-path is within the township of *Barton-upon-Irwell*, and the residue thereof is in other townships. There are several weirs and locks on the navigation, erected and maintained by the appellants, within the township of *Barton-upon-Irwell*; and the surplus water held up by one of the said weirs is taken from the appellants by the proprietors of a neighbouring mill, who pay an annual rent to the appellants for it. A very large traffic is carried along the navigation in flats and other vessels, belonging in part to the appellants, and the residue to other persons, who employ them in the carriage of goods between *Manchester* and *Liverpool*. The tonnage actually received by the appellants from other persons, together with the tonnage which would be received by them if the vessels so employed by themselves were the property of other persons, amounts to a large sum; and the proportion thereof payable in respect of the length of the navigation and towing-paths, in the township of *Barton-upon-Irwell*, amounts to the sum of 2600*l*. The appellants contended, that they were not rateable at all for or in

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respect of the property rated ; or, if rateable at all, that they were only rateable for and in respect of the cuts, and not in respect of the rest of the navigation and towing-paths ; and that, in such case, they ought only to be rated in the proportionate part of the sum of 2600*l.*, which should be considered payable in respect of the said cuts ; and, further, that they were not rateable for tonnage upon their own vessels, which paid no such duty. But the Court of quarter sessions held, that they were liable to be rated for the whole line of navigation within the township of *Barton*, in respect of the land *taken and used by them for the Mersey and Irwell navigation, the towing-paths, wears, locks, cuts, and sluices*, but assessed the annual value of the profits at 2600*l.*, and ordered the sum to be reduced accordingly.

Courtenay, Starkie, and Armstrong in support of the rate. The company are rated for land taken and used for the purposes of the navigation, for towing-paths, locks, and the tonnage arising therefrom. These are all the subject-matter of rate, but it will be contended that the company are not occupiers of the land covered with water. It is found by the case that the company scour and dredge the river ; that they apply the gravel and sand taken out of the river to the repairs of the towing-paths, and that they sell the surplus. They have the sole right of navigating the river, with the exception that the owners of the adjoining lands have the right of using pleasure-boats. They make and maintain the towing-paths. All these acts afford the strongest evidence of occupation ; and it is clear that, if they occupy, they are beneficial occupiers, for they receive the tolls for their own

use

use and benefit. The statute of the 7 G. 1. (a) speaks of purchase-money, and appoints commissioners to determine differences between the undertakers and the respective owners of lands, tenements, and hereditaments adjoining or near the same, and to adjust what proportion every person shall have for his respective interest in the same. It provides also, that the owners of the lands adjoining the river may use pleasure-boats without paying toll. Then the 4 G. 3. c. 37., which incorporated the company, enacts, that the lands, tenements, and hereditaments, whereof the proprietors were seised in any estate of freehold, shall be vested in the company of proprietors for the benefit of the said several proprietors, and that the company shall have power and authority to *purchase* lands, &c. for the use of the navigation. The company, then, had the power to purchase, and they

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(a) By the 7 G. 1. the commissioners therein named were authorized to determine all differences between the undertakers and the respective owners and occupiers of such lands, wears, mills, tenements, or other hereditaments adjoining to the rivers *Mersey* or *Irwell*, or to the new cuts, &c. as should be intended to be *pulled down*, damaged, or made use of for carrying on the said undertaking, and to determine what satisfaction every such person or persons should have for such proportion of their lands, &c. as should be cut, digged, or made use of, or damaged as aforesaid, and to settle what share and proportion of such *purchase-money* or satisfaction every tenant and other person having a particular estate, term, or interest in any of the premises, should have for their respective interests.

By another clause, it was provided and enacted, that it should be lawful for the owners and occupiers of lands or tenements adjoining the rivers, or navigable passages, to use any pleasure-boat upon the rivers without any interruption from the undertakers, and without paying any rate or duty for the same, so as the said pleasure-boat was not made use of for carrying coals or other goods or merchandise; saving to the land-owners or proprietors of all royalties, or liberties of fishing or fowling upon the said rivers, their respective rights and privileges of fishing and fowling in the same.

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have the dominion of the river. They therefore occupy the river, either by reason of having rented or purchased the same. If that be so, they might maintain trespass. This case is distinguishable from *Hollis v. Goldfinch* (a), and *Buckeridge v. Ingram* (b), because in those cases the acts of parliament did not give the undertakers, who were to make the rivers navigable, any power to purchase. In *The Duke of Newcastle v. Clarke* (c), the commissioners of sewers were mere ministerial officers without any interest. In *Dyson v. Collick* (d), the contractors for making a navigable canal having, with the permission of the owner of the soil, erected a dam of earth and wood upon his close, across a stream there, for the purpose of completing their work, were holden to have a possession sufficient to entitle them to maintain trespass against a wrongdoer. The statute of the 43d of *Elizabeth* requires, that in order to make parties rateable they shall be occupiers of land, but a party in apparent visible enjoyment of the property must be held to be the occupier; for it is to such person only that the overseers can look for the payment of the rate. Here the company exercise all the acts which an occupier does. If the property be rateable, the company are the occupiers. The owners of the adjoining land are not the occupiers, for they have no right to use the navigation but for pleasure-boats. The same land may be subject to several occupations; as if the owner grants to one person the right of making a railway; to another, a right of laying down pipes for water; and to another, a right of laying down pipes for gas. All these

(a) 1 B. & C. 205.

(b) 2 Ves. jun. 652.

(c) 8 Taunt. 602.

(d) 5 B. & A. 600.

persons would be rateable as occupiers, *Rex v. The Rochdale Water Works Company* (a), *Rex v. The Birmingham Gas Company* (b), *Rex v. Brighton Gas Company* (c). So here the company make banks, and thereby occupy the river. *Rex v. M'Donald* (d), *Rex v. Cardington* (e), and *Rex v. The Mayor of London* (f), *Rex v. Palmer* (g), and *Rex v. The Earl of Portmore* (h), shew they are liable to be rated. In the two last mentioned cases the proprietors of a river navigation were held to be rateable. *Rex v. Jolliffe* (i), is not an authority in favour of the appellants. There the lessee did not make the waggon-way, but only had the use of it for carrying his coals, paying so much per ton, just as the persons going upon this river pay the toll. In *Rex v. Bell* (k), the defendant made the waggon-ways, enclosed them and excluded others, and he was held to be rateable for the waggon-ways. Here, this company exclude all who do not pay toll. But, assuming that the company are not occupiers of the bed of the river, yet they occupy something, viz., the cuts, which contribute to the gross profit, and they must be rateable for the whole of the profits. The authorities shew, that where the land contributes to the gross profit, the rate must be in the lump, *Rex v. Hogg* (l), *Rex v. Bradford* (m). At all events they are rateable for the towing-paths, for they have either purchased or rent the land of the towing-paths.

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(a) 1 M. & S. 634.

(c) 5 B. & C. 466.

(e) Comp. 581.

(g) 1 B. & C. 546.

(i) 2 T. R. 90.

(f) Cald. 266. 1 T. R. 721.

(b) 1 B. & C. 506.

(d) 12 East, 324.

(f) 4 T. R. 21.

(h) 1 B. & C. 551.

(k) 7 T. R. 698.

(m) 4 M. & S. 517.

Sir

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Sir James Scarlett, J. Williams, Coltman, Aglionby, and Dr. Brown, contra. First, the company are not liable to be rated in respect of the bed of the river, though as to the towing-paths there may be some difficulty. In order to be rateable, they must be occupiers of land within the words of the statute of *Elizabeth*. Now, if the company are the occupiers of land, they may maintain trespass; but it is quite clear that they could not maintain such an action against a person for passing a boat over the river. The proprietor of land, having a pond on his land, may maintain trespass against another who passes a boat over such pond. The acts of dredging and scouring are not stronger acts of occupation than the acts done by a builder who is employed by another to repair his house. Such acts, though *prima facie* evidence of occupation, may be explained by the purpose for which they are done. In this case, they are explained by the acts of parliament, which authorize the company to do these acts, in order to make the river navigable, but which do not vest in them the soil or the minerals under it, but only give them an easement in the soil of another. *Rex v. Nicholson* (a), *Rex v. Jolliffe* (b), and *Rex v. River Weaver* (c), are authorities that they are not rateable. In the case of an ordinary canal (where the channel for the water is artificially made), the proprietors become the purchasers of the land. They are the occupiers of such land, and therefore rateable. But where the channel is already formed by nature, and requires to be improved for the purpose of navigation, the undertakers, in order to make such improvements, require not the dominion of the soil, but a right of entry, for the pur-

(a) 12 East, 330.

(b) 2 T. R. 90.

(c) 7 H. & C. 70.

pose of improvement; and, where they have such right only, they are not occupiers of the land, but have a mere easement in it. They cannot therefore maintain trespass, *Hollis v. Goldfinch* (a). In *Rex v. The Earl of Portmore* (b), the proprietors had the soil of the river *Wey* vested in them by act of parliament; and in *Rex v. Palmer* (c), the proprietors had the same interest in the soil of the river *Lark*. Then, as to the towing-paths, the facts, it has been since found, are not correctly stated; for it has been ascertained that the extent of the canal within the township is nine miles in length, and the towing-paths are only six, so that, with respect to them, the company has been overrated. The company, in this case, have undoubtedly a right to purchase land for making towing-paths. The rent is a mere compensation paid to the owner of the soil for the damage done. The occupiers of the adjoining land have a right to pass and repass to the river. The banks are repaired generally by the land-owners. They are, therefore, occupied by the land-owners for beneficial purposes, as they were before the river was made navigable. The company are not rateable for their gross profits, because they are in possession of the cuts which contribute to the gross profits. It is established by the authorities, that no one is to be rated unless he occupies land, and then only in proportion to the profit which that land yields. Here the profits arise, not from the occupation of the cuts exclusively, but are a compensation to the undertakers for making the whole line of river navigable. Some part of the profit must be attributed to the river as the meritorious cause.

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(a) 1 B. & C. 205.

(b) 1 B. & C. 551.

(c) 1 B. & C. 546.

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and IRWELL
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Lord TENTERDEN C. J. I am of opinion that the company of proprietors are not rateable for the ancient bed of the navigable part of the river ; and, inasmuch as the rate which the sessions have affirmed is made on them as occupiers of that part of the navigable ancient bed of the river which is situate in the township of *Barton-upon-Irwell*, the order of sessions must be quashed. It does not follow, however, that the whole rate ought to be quashed by this Court even on these proprietors, much less the whole rate on the whole parish. Some matters there are which, according to the present state of the case, appear to be rateable ; such as the new cuts, which are made through the soil of which the proprietors were actual purchasers. They must be considered, in respect of those cuts, in the same light as the proprietors of any ordinary canal. So of the locks, and the only question will be as to the amount. I say nothing about the towing-paths ; for there seems to be some question whether the facts, as to the length of those in the township, are correctly stated. But inasmuch as there is one sum now applied to a subject for which the company are not rateable, joined with a subject-matter for which I think they are rateable, the inclination of my mind is to quash the order of sessions, and send the case to them that they may rate such parts as are rateable according to their own judgment, if they can come to any proper conclusion upon the question.

BAYLEY J. When this question was first presented to my consideration in the case of *Rex v. Thomas (a)*, it struck me that the company were liable to be rated in respect of the navigation and the other property ; but,

(a) See the next case.

on further consideration, I think that, with reference to the navigation, viz. the navigable bed of the river, I was wrong. In order to make them rateable they must be within the words of the 43d of *Elizabeth*, "occupiers of lands or houses;" and it struck me at first, that inasmuch as they had a right to have the bed and banks of the river upheld to hold the water, which water they were to use, they might, perhaps, be called the occupiers of that land which was so covered with water, and which held the water so afterwards to be used. But, when after considering the subject, I find that they can maintain no description of action which an occupier generally is capable of maintaining; I am now disposed to think, that the correct view of the case is not that they are occupiers of the land covered with water, but that they had an easement only in the land. Where the proprietors of a canal purchase the land, and are themselves owners of the soil, they are rateable, on the principle that they are the occupiers of the soil which belongs to them; but, in this case, the soil, as far as we can form any judgment, does not belong to this company. They have only a qualified right to use the land, to deepen the channel of the river, and make the soil fit for the purpose of holding the water, which water they are afterwards to use; but subject to the right of navigation being vested in them, and subject to the right they have that the soil shall continue to hold the water in which the navigation is to take place, the soil remains in the ownership and occupation of those persons to whom that soil originally belonged. When the company make cuts under the powers of the act of parliament, which authorizes them to buy the land for the purpose of making these cuts, they are, with reference

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to those cuts, proprietors and occupiers of land, and therefore rateable in respect of that land. As they have a right also to erect wears, and dams, and locks, those wears, and dams, and locks, being on their own land, become their own real property; and they are the occupiers of that land on which those wears, dams, and locks respectively are, and they are therefore rateable in respect of them. But, for the reasons I have given, (which I have thought right to state, having on a former occasion expressed an opinion that the navigation was rateable,) I am of opinion that they are not liable to be rated for the navigation. It seems to me, therefore, that the proper course is to send the rate down to the sessions for amendment. For, if the rate be quashed, this consequence will ensue; namely, that a rate will be levied in respect of the bygone time, and the former overseers of the parish will be reimbursed by rates to be levied, not on the persons who were occupiers at the time when the expenditure took place, but by a rate on those persons who have become occupiers since that time. For these reasons I think the case ought to go back to the sessions, that they may rate those parts of this property which ought to be rated.

LITLEDALE J. I am entirely of the same opinion, that the principal subject of this rate, viz. the navigation, is not rateable, and I think the case ought to go back to the sessions to have the rate amended. The inconvenience mentioned by my Brother *Bayley* would certainly arise if the rate were quashed entirely; but for that, I should have thought it more convenient that this part of the rate should have been quashed altogether. It seems to me there may be some difficulty (but we have

have nothing to do with that) in ascertaining how these locks and towing-paths are to be rated. The rate is an entire rate on the whole profits, and I do not see how it is possible to say how much a lock or a towing-path produces. Suppose they were to make 2000*l.* annual tolls, how can it be ascertained what proportion of that sum is contributed by the locks and towing-paths. That, however, is a question for the sessions.

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PARKE J. I agree with the rest of the Court in thinking that the order of sessions should be quashed. The question has been argued with much ability, and at last is reduced to a very simple point, namely, Whether we can pronounce that these defendants are on this finding "occupiers of lands?" If they are occupiers of lands, they are rateable; if they are not occupiers of lands, they are not rateable. Many of the early cases of rateability seem to have proceeded upon a disposition of the Court (pardonable, but perhaps not strictly correct,) to extend the operation of the statute of *Elizabeth*, so as to include as large a fund as possible in the rate. The law on this subject was at length settled in the case of *Williams v. Jones (a)*. It is clear from that case, that no one can be rated unless he be an inhabitant or occupier, and these defendants are not inhabitants. The question then is, Whether they are occupiers of land? If they have a mere easement they are not rateable. Persons who have a right of common, a right of way-leave, or a right of ferry, are not rateable. This subject-matter of rate cannot be well distinguished from the case of a ferry from which the owner of the ferry de-

(a) 12 *East*, 346.

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rives a particular benefit, and from the use of which the public also derive a benefit. In *Williams v. Jones* (a), the owner of the ferry had repaired the landing-place, which was parcel of a highway on the bank of the river, and had a post fixed in the ground there, to which the boats were usually moored, and yet he was held not to be the occupier of the highway, though he had a special power and privilege as to a part of it. Now in this case it is quite clear that as to the bed of the river, the *Mersey and Irwell* navigation company had only a special power, they had not the exclusive occupation of any part of it. It seems to me, therefore, they are not rateable for the bed of the river. No person can be an occupier unless he has the exclusive right to enjoy some portion of the soil. It will be found that that obtains in the case of the gas companies. There the companies who have gas-pipes have the exclusive right to enjoy a portion of the soil; they have the exclusive right of occupying by means of these pipes that portion of the soil in which the main is. But in this case, the company have no exclusive right to occupy any part of the soil of the bed of the river. As to the locks, if it shall appear that the property of the soil (where the locks are made) is in the company, they will be rateable. As to the cuts made at the outset of the navigation (the property being in the company), they are rateable in respect of them. There may be a difficulty in affixing the quantum of rate; that, however, is not for us but for the sessions to settle. They will fix that according to the degree of productive value which they may ascertain to arise from the occupation of this particular part of the soil. It seems clear, on the

(a) 12 *East*, 546.

whole,

whole, that in this case the company of the *Mersey* and *Irwell* navigation are not rateable for the bed of the river, for they have merely an easement in it. Probably, certain acts which they have exercised might be *prima facie* evidence of their being owners of the soil; but the moment the statute is looked at, it is quite clear that those acts are referable to the powers they have under the statute, and not to any exclusive right to the possession of the soil. It seems to me, therefore, that they are not liable to be rated for the bed of the river, having only an easement in it, but that they are liable to be rated for the cuts, for they are owners of the soil of them, and derive a benefit from them, either directly in the shape of toll, which they receive from other persons, or indirectly in respect of what they receive from their own customers; and whether they receive it from other persons who pay toll, or receive it from their own customers at the end of the voyage, makes no difference, as the enjoyment of that land is profitable to them in both cases, and for that profit they ought to be rated. As to the remaining question, it will be whether they are owners of the soil on which the locks are placed; if they are, and if they have the land on which the locks are placed in their use, if they have the right of possession, and receive the profit arising on that, they will be rateable.

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LORD TENTERDEN C. J. All that we can pronounce is, that we quash the order of sessions: the rate is not brought up before us.

Order of sessions quashed.

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*Monday,
February 9.*

The KING against THOMAS.

By an act of parliament certain persons were authorized to make the river *Avon* navigable from *B.* to *H.*, and to maintain such navigation; and, for those purposes, to clear, scour, open, enlarge, or straighten the river, to dig and cut the banks, to make new cuts, trenches, or passages for water through lands adjoining; and to build bridges, sluices, locks, &c. and to do all other things necessary for making and maintaining the navigable passage, first giving satisfaction to the owners of lands; and commissioners were appointed

UPON an appeal against a rate for the relief of the poor of the parish of *Keynsham*, in the county of *Somerset*, whereby the defendant and other proprietors of the navigation of the river *Avon*, from *Hanham* mills to the city of *Bath*, were rated in the aggregate sum of 2*l.* 10*s.* upon an annual value of 100*l.*, for or in respect of a lock, sluice, cut, and land covered with water, being part of the river *Avon* in the said parish, and for profits arising from the same by carriage of merchandize and persons thereupon, being a proportionate part of the tolls collected and received in respect of merchandize and persons carried upon the river *Avon*, from and to *Hanham* mills to and from the city of *Bath*, the sessions amended the rate by striking out the words “and land covered with water, being part of the river *Avon* in this parish,” and by altering “100*l.*” to 5*l.*, and 2*l.* 10*s.* to 2*s.* 6*d.*, subject to the opinion of this court on the following case:—

The river *Avon* was made navigable soon after the passing of the 10 *Anne*, c. 8., entitled “An Act for

to settle what satisfaction every person should have for such proportion of his lands as should be cut, dug, removed, or made use of for carrying on the undertaking, and to settle what proportion of such purchase-money or satisfaction every person, having a particular estate or interest in any of the premises, should have for his respective interest; and, in consideration of the expenses to be incurred, the undertakers were authorised to take, for their own proper use and behoof, certain tolls. The undertakers made the river navigable, scoured and cleansed the same, and made a certain cut and lock, for the purposes of the navigation, upon lands purchased by them: Held, that they were not liable to be rated to the poor for the land covered with water, being part of the river *Avon*, because they were not occupiers of that land, but had a mere easement in it; secondly, that they were liable to be rated for the cut and lock.

making

making the river *Avon*, in the counties of *Somerset* and *Gloucester*, navigable from the city of *Bath* to or near *Hanham* mills," and was so made under the authority of that act by the proprietors of the navigation, the predecessors of the appellants. By the 47 G. 3., entitled "An Act for enabling the proprietors of the navigation of the river *Avon*, in the counties of *Somerset* and *Gloucester*, from the city of *Bath* to or near *Hanham* mills, to make and maintain a horse towing-path for the purpose of towing and hauling with horses, or otherwise, boats, lighters, and other vessels up and down the said river," further powers were given to the said proprietors. The river has continued to the time of the rate navigated and navigable, and the proprietors have received the tolls, rates, and duties given by the acts, or either of them, from all passengers and goods passing on the river. No part of the towing-path mentioned in the act of the 47 G. 3. is within the parish of *Keynsham*. A certain cut was, before the passing of the 47 G. 3., made in the respondent parish as part of the river, and a certain lock within that parish, and in that cut, was at the same time constructed at the expense of the proprietors for the purposes of the navigation, and under the provisions of the statute of *Anne*, and both have been and still are used for the same purposes by persons paying tolls, rates, and duties to the proprietors. And the proprietors have and still do, under the powers of the statute of *Anne*, from time to time as need requires, clear, scour, and cleanse the bed of the river. The clear annual amount of the tolls, rates, and duties received by virtue of the statute of *Anne* on the navigation, which is eleven miles in length, is 4000*l.* per

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annum. The length of the river in the respondent parish is three miles, the length of the cut in that parish is 300 yards. No specific toll, rate, or duty is payable for passing the lock or cut. For the purposes of the tolls, rates, and duties, the cut and lock are parts of the navigation of the river. The cut and lock are substituted for the natural river. None of the appellants reside within the parish of the respondents. The question for the opinion of this Court was, Whether the appellants were rateable for the whole or any part of the subject-matter of the rate? If they should be of opinion that the whole is rateable, the rate to be confirmed; or, if they should be of opinion that the cut and lock only are rateable, the rate to be amended by reducing the annual value to 5*l.*, and the amount of assessment to 2*s.* 6*d.* If they should be of opinion that the lock only is rateable, then the rate to be amended by reducing the annual value to 2*l.* 10*s.*, and the amount of the assessment to 1*s.* 3*d.* If of opinion that no part is rateable, the rate to be quashed.

This case was first argued at the sittings in Banc after *Michaelmas* term; and in the course of that argument *Bayley* J. intimated his opinion that the company were rateable for the land covered with water; but by the direction of the Court, the case was argued again a second time in the early part of this term, by

Jeremy and *Moody* in support of the rate. The company are occupiers of the banks and bed of the river; for it is found as a fact, that they have scoured and cleansed the bed of the river. That act, *per se*, would be sufficient evidence of occupation, or even of possessory title in an ordinary case. Assuming, however, that

that the acts done by the company must be taken to have been done in exercise of the powers granted to them by the act of parliament, there is quite sufficient to shew that they had the soil of the river; for the act of the 10th of *Anne* (a) authorizes the undertakers to clear, scour,

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(a) By the 10 *Anne*, c. 8. s. 1. it was enacted, that the mayor, aldermen, and common council of the city of *Bath*, their successors and assigns, or such person or persons as they should nominate and appoint, should be and were authorised, at their proper costs and charges, to make the river *Avon* (from the city of *Bath*, down into and within the mill pool or wear pool below *Hansham* mills and wear, not exceeding 150 yards,) navigable for boats, lighters, and other vessels; and from time to time to continue, maintain, and use such navigation in such manner, and also by, through, and upon such passages and watercourses into the said river as they should think fit; and for those purposes to clear, scour, open, enlarge, or straighten and restrain the said river from the place aforesaid, or any other streams, brooks, or watercourses, which came or might be brought into the same; and to dig, open, or cut the banks of the river, or any other the streams, brooks, or watercourses aforesaid; and to make any new cuts, trenches, or passages for water, in, upon, and through the lands or grounds adjoining, or near unto the river, streams, brooks, or watercourses, as they should think fit and proper for navigation of boats, &c. or any ways necessary for the more convenient carrying on and effecting the said undertaking, being the soil or ground of her majesty, or of any other person or persons, &c.; and to remove all trees and other obstructions which might hinder the navigation, either in sailing or haling of boats, lighters, &c. upon the river, brooks, &c.; and to build and make over or in the river, streams, &c. or upon the lands adjoining or near the same, or any of them, such bridges, sluices, or other works as and where they the undertakers and their successors should think fit, and to alter, repair, and amend the same; and to make any ways, passages, &c. for the carrying commodities, goods, and all other things to and from the river, navigable passages, &c., and for carrying all manner of materials for erecting the said works, and for altering the same, and to lay the materials on the ground, near the places where the works should be made or done; and to amend, heighten, or alter any bridges, or to turn or alter any highways in or upon the river, streams, &c. as might hinder the navigation thereon; as also to set out and appoint towing-paths for haling or drawing of boats, &c. passing upon the river, streams, &c. as the said undertakers and their successors should think convenient, and

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scour, open, enlarge, or straighten the river, to dig or cut the banks, to make new cuts for water through the lands adjoining the river, to remove trees and other obstructions,

to do all other matters and things which the said undertakers, their assigns or nominees, should think necessary for making and maintaining the river, streams, &c. navigable as aforesaid, or for the improvement or preservation thereof, the said undertakers, their successors or assigns, first giving satisfaction to the owners or proprietors of such lands, tenements, or hereditaments respectively, as shall be digged, cut, or removed, or otherwise made use of for pathways, or the carrying on and effecting the said navigation, or maintaining the same according as was thereafter by that act provided for and appointed.

By s. 2. certain persons, therein mentioned, were appointed commissioners for settling any difference that might arise between the undertakers, &c. and the proprietors of the said lands, tenements, or hereditaments; and they were thereby empowered to settle and determine what satisfaction every such person should have for such proportion of his lands, &c. as should be cut, digged, removed, or made use of as aforesaid, and for the damage that should be thereby sustained; and to adjust and settle what share and proportion of such *purchase-money* or satisfaction every tenant or other person having a particular estate, term, or interest in any of the premises, should have for his respective interest or right.

By s. 4. it was enacted, that in consideration of the charges and expenses the undertakers, &c. would be at, not only in making the river navigable, but also in repairing and keeping up the said works, locks, &c. it should be lawful for them at all times thereafter to demand, receive, and take for their own proper use and benefit in respect of their charges and expenses aforesaid, for all and every passenger, goods, &c. that should be carried down the said river from the city of *Bath* to *Hannam* mills, the rates and duties thereafter mentioned.

Sect. 12. reserved to the lords, owners, or proprietors of all royalties or liberties of fishing or fowling in the river, their respective rights of fishing or fowling in the same.

Sect. 15. enacted, that in case the undertakers of the navigation should not, when occasion required, sufficiently repair and amend all defects and decays that should happen to the locks erected by virtue of that act, or within four days after notice given to them to do the same, it should be lawful to the proprietors or possessors of the weirs and mills adjoining to such locks to repair the same.

The

obstructions, to make bridges, sluices, and other works over or in the river, or upon the lands adjoining the same, and to do all things necessary for making the river navigable, first giving satisfaction to the owners of such lands as shall be used for the purpose of maintaining the navigation. Section 2. speaks of *purchase-money*, and appoints commissioners, who are to settle what proportion of such purchase-money every person having a particular estate or interest in the premises shall have for his respective estate or interest. This act of parliament, therefore, contemplates a purchase to be made by the undertakers of the navigation. It, therefore, differs in this respect from the act of parliament made for making navigable the river *Itchin*, upon which the decision in the case of *Hollis v. Goldfinch* (a) proceeded. The company here might maintain trespass for any injury to the soil of the river. They are, therefore, in the possession or occupation of it. By section 15. of the statute of *Anne*, in case the undertakers of the navigation shall not well and sufficiently repair all

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The 47 G. 3. after reciting the statute of *Anne*, the appointment of nominees to execute the works, and that the said nominees had proceeded to purchase lands and hereditaments, and to make the navigation and works, and to carry on the same under the rules and regulations of the recited act, and that the tolls arising from the navigation, together with the locks and other works belonging to the same, had become vested in the company of proprietors of the *Kennet and Avon* canal navigation, enacted, that it should be lawful for the said company of proprietors to make towing-paths for drawing with horses, &c. any boats or other vessels navigating thereon, between *Bath* and the mill pool and wear, below *Hawsum* mills and wear, not exceeding 150 yards; to purchase lands for that purpose; and upon payment or tender of the money agreed upon for the purchase of such lands, &c. immediately to enter upon such lands, &c.

(a) 1 B. & C. 205.

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decays which shall happen to the locks within four days after notice to them to do the same, a right of entry is given to the proprietors or possessors of the wears and mills next adjoining to such locks to repair the same. This clause virtually excludes any right of entry in all other cases. The statute 47 G. 3. recites the statute of *Anne*, and the appointment of nominees to execute the works, and that the nominees had proceeded to purchase lands and hereditaments, and to make the navigation and works, and to carry on the same. It contains a clause enabling the proprietors to purchase lands to make towing-paths, and upon payment or tender of the money agreed upon for the purchase of such lands, the proprietors of the tolls and shares are to have a right of entry. The case states as a fact that the proprietors have cleansed and scoured the bed of the river. That, per se, would be sufficient evidence of occupation of the river. It gave them a possessory title. They were, therefore, the occupiers of the bed of the river, and might maintain trespass. *Buckeridge v. Ingram* (a) is an authority to shew that the proprietors had an interest in the realty. But it is not necessary that the company, in order to be rateable for their profits, should have such a possessory interest in the soil as to enable them to maintain trespass; they are rateable if they receive a profit from the use of land locally situate within the parish, *Rex v. Cardington* (b), *Rex v. Macdonald* (c), *Rex v. The Trent and Mersey Navigation* (d), *Rex v. The Birmingham Gas Company* (e), *Rex v.*

(a) 2 Ves. jun. 659.

(b) Comp. 581.

(c) 12 East, 524.

(d) 1 B. & C. 545.

(e) 1 B. & C. 506.

The Brighton Gas Company (a), *Rex v. Bath* (b), *Rex v. The Rochdale Water Works* (c), *Atkins v. Davis* (d).

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And the proprietors of a river navigation were held to be rateable for the bed of the river in *Rex v. Palmer* (e), and *Rex v. The Earl of Portmore* (f). The case of *Rex v. The Trustees of the River Weaver Navigation* (g) was decided upon the ground that the tolls were applicable to public purposes. In *The Duke of Newcastle v. Clarke* (h), it was decided that the commissioners of sewers could not maintain trespass, on the ground that they were public functionaries without having any interest whatever.

Campbell, Rogers, and Bere contra. The company of proprietors are not rateable for the land covered with water, for the locks, or the sluice. The statute 47 G. 3. does not bear upon the question, because it is found that no part of the towing-path is within the parish of *Keynsham*. First, the company are not rateable for the land covered with water, being part of the river *Avon*, because they are not occupiers of that land within the meaning of the 43d of *Elizabeth*. In order to be rateable, they must have an actual occupation of the soil of the river. Their rights are defined by the statute of *Anne*, which gives the undertakers no interest in the soil or the water. It does not even give them the use of the water in a more ample manner than each of them has as one of the public. Their interest is very analogous to that of the trustees of a turnpike road.

(a) 5 B. & C. 466.

(b) 14 East, 609.

(c) 1 M. & S. 634.

(d) Cald. 315.

(e) 1 B. & C. 546.

(f) 1 B. & C. 551.

(g) 7 B. & C. 70.

(h) 8 Taunt. 602.

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But there, inasmuch as such trustees run no risk, and incur no charge, they have no interest in the tolls; whereas, by section 4. of this act, in consideration of the charges to be incurred in making the river navigable, these proprietors have the grant of toll. There is no analogy between the toll taken upon a river navigation, and the toll taken upon a canal. This act of parliament gives certain persons a right to take toll of those who pass over the soil of third persons, and along flowing water which is publici juris. This toll, therefore, is in the nature of toll thorough, which is a toll taken for passing over a highway where the owner of the toll claims nothing in the soil, and the consideration upon which the claim is founded is expressed in the act to be the cleansing of the river, which would have been a sufficient consideration at common law, *Lord Pelham v. Pickersgill* (a). But the toll taken upon a canal is, strictly speaking, toll traverse, which requires no consideration to support it, because it is expressly defined to be "a payment of a sum of money for passing over the private soil of another," *Heshord v. Wills* (b); and, therefore, when canal proprietors have purchased land and cut their canal through it, they may demand tolls of those persons passing over their soil without shewing any consideration to support the demand. Now toll thorough is not rateable, but toll traverse is. The company of proprietors in this case cannot bring any action for intermeddling with the water, unless it interfere with or abridge their franchise. The undertakers did not make the channel, nor cause the water to flow in it, as in the case of artificial canals.

(a) 1 T. R. 660.

(b) *Sid.* 484. 1 *Mod.* 48. S. C.

If they had, the tolls would have been higher. They simply removed the difficulties in the way of the navigation, and the tolls are paid to them for doing that only. The act of parliament gives them a statutable licence to enter for the purpose of doing that which the legislature deemed to be for the benefit of the public, but it does not give them any interest in the soil. They cannot maintain trespass for any injury done to the land; and a party is not, in any case, rateable as occupier of land where he cannot maintain trespass for an injury done to that land. In *Rex v. The Mayor of Sudbury* (a), *Holroyd J.* relied upon the fact, that the corporation were in possession and could maintain trespass, in order to shew that they, and not the burgesses, were rateable. So in *Rex v. Watson* (b), *Lawrence J.* says, "The party, if rateable at all in respect of land, must be rated as occupier; occupation, properly speaking, is possession, and trespass can only be brought by him who is in possession of the land." So in *Rex v. Ellis* (c), *Le Blanc J.* founds his opinion upon the fact, that the right assessed was a right of soil.

Then if the true criterion to determine whether a party be rateable as the occupier of land be whether he can maintain trespass in respect of an injury done to that land, the question is, Whether this company can maintain trespass for an injury done to the soil of the river? Before the passing of the statute of *Anne*, the then owners of the soil of the river were the occupiers, and were entitled to maintain trespass for any injury done to it. That act of parliament does not take

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(a) 1 B. & C. 395.

(b) 5 East, 487.

(c) 1 M. & S. 664.

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away from the original owners the soil of the river, or the mines under it, but merely gives the undertakers certain rights to be exercised in alieno solo. The original owners, therefore, continued to have the soil subject to the easement of the company, and may still maintain trespass for an injury done to the soil of the river; there may even be a part of the bed of the river into which the company may never have had any right to enter. Suppose, for example, there were 100 yards of the navigation which had never required to be scoured, cleansed, or widened, the company would never have had any right to enter into that part, because they have authority only to enter for the purposes of cleansing, scouring, and rendering the river navigable. The original owners of the soil might maintain trespass against the company of proprietors if they broke the soil of the banks for any other purposes than those mentioned in the act of parliament. The latter could not justify even entering for the purposes of widening the river, unless such widening was necessary in order to render the river navigable. It is clear, therefore, that the former owners of the bed of the river may maintain trespass against a wrong-doer, and that the company of proprietors, who have a mere easement in alieno solo, cannot. They are not, therefore, the occupiers of the land covered with water; and *Rex v. Jolliffe* (a) is an express authority to shew that a mere easement in the soil of another is not rateable. The right which the proprietors of this navigation have is not distinguishable in principle from that which the owner of a ferry has: he has a right to cross the river, and if

(a) 2 T. R. 90.

the owner of the soil of the river subtracted the water he would be guilty of a wrongful act, and would be liable to an action on the case at the suit of the owner of the ferry; but the latter has no right to the soil over which the water runs, neither have the owners of this navigation.

It is a general principle, that trespass lies only for injuries to real property corporeal in possession of the plaintiff. There are two exceptions to that rule; they are a free warren and a several fishery. It is doubtful, however, whether a several fishery can exist without ownership of soil, *Seymour v. Lord Courtenay* (a). The right, in those cases, is founded on the exclusive possession which the owner of a several fishery, or a free warren, has in those franchises. It is an universal rule, that the possession must be exclusive to entitle a party to maintain trespass. There must also be an interest of the plaintiff in the land, either temporary or conditional, as *prima vestura*. In *Challenor v. Thomas* (b), it is said by the Court, if the land under the water does not pertain to the plaintiff, but the river only, then upon a disturbance his remedy is only by action on the case upon any diversion of it, and not otherwise. The right of the company in this case is analogous to the right of market, into which the public have a right to enter and sell, as the public have here to pass and repass, subject to payment of toll, for which an action may be maintained, but not trespass, *The Mayor of Northampton v. Ward* (c). The case of *Rex v. Bell* (d) is decisive of this. There the appellant, as lessee of the tolls of the market, was held not to be rateable as an occupier of

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(a) 5 Burr. 2814.; and see *Duke of Somerset v. Fogwell*, 5 B. & C. 87.

(b) Yelv. 145. S. C. Gouldsb. & Brownl. 143.

(c) 1 Will. 107.

(d) 5 M. & S. 221.

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land, because he had no interest in the soil. [*Little-dale J.* Suppose these proprietors had been owners of the soil as well as grantees of the tolls, how would the case have been?] Still they would not have been rateable; for the tolls are holden separately from the soil, and by distinct titles. In *Heddey v. Welhouse* (a) this distinction is taken, "If the king grant a fair or market with toll certain to one and his heirs, to be holden in land which is borough *English*, and the grantee die, the heir at the common law shall have the fair or market and the toll, but the younger son shall have the piccage and stallage with the soil by custom." The mere use, though exclusive of land, does not entitle a party to maintain trespass. Thus trespass will not lie for disturbance of a pew, in which a party claims no interest, but only to sit there, *Dawtree v. Dee* (b), *Stocks v. Booth* (c). So in the case of rights of common and private rights of way, trespass will not lie for an infringement of those rights. In *Comyn's Digest, Trespass D.*, it is laid down generally, that trespass *quare clausum fregit* does not lie where damage is done to a privilege; liberty, or easement which a man has in the soil of another, but he may have an action on the case. In all these cases, he has the use of the land, and profits and advantages arising out of the land; but still, having no tangible interest, trespass will not lie. At all events a limited use, such as that which this company has, is not sufficient. There must be a sole and exclusive use, as a sole and exclusive pasturage of cows in particular meadows, *Birt v. Moore* (d). Commissioners

(a) *Moore*, 474.(b) *Palm*, 46. 2 *Roll. Rep.* 139.(c) 1 *T. R.* 428.(d) 5 *T. R.* 329.

of sewers who have only a bare authority, and no estate or interest, cannot maintain trespass, *The Duke of Newcastle v. Clarke* (a). So commissioners under an inclosure act have no possession of the soil, *Driver v. Simpson* (b). So the conservators of a river, whose duties are defined by the 1 Hen. 4. c. 12., to be to survey and keep the waters and great rivers, and to amend defaults, are not occupiers of the river. Lord Hale, *De Jure Maris*, c. 5. p. 23. (c), describes them as river scavengers. In modern times, the undertakers of a navigation purchase land, and cut their canals through the land purchased. They are the occupiers of that land, and the tolls are the profits derived from the use of it. But where undertakers, as in this case, have a mere right to be exercised in the soil of another, they have no occupation of the land, but a mere easement on it. *Buckeridge v. Ingram* is an authority to shew that the proprietors of this navigation had no interest in the soil, but a mere easement on it. There are many instances where rivers have been made navigable under powers granted by act of parliament. By the statute 16 & 17 Car. 2., power was given to certain undertakers to make the river *Itchin* navigable; but the act of parliament did not vest the soil of the river in those undertakers, but gave them rights to be exercised in alieno solo, very similar to those granted to the undertakers by the statute of Anne; and in *Hollis v. Goldfinch* (d), this Court held that the proprietors had no occupation of the soil, but a mere easement on it, and that they could not maintain trespass. The river *Avon* is a highway;

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(a) 8 Taunt. 602.

(b) 8 Taunt. 614. note.

(c) 1 Hargrave's Law Tracts.

(d) 1 B. & C. 205.

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it is a river common to all the king's subjects, *Vin. Abr. Chemin, A.*, *Hawk. P. C. c. 76. s. 2.* and *Rex v. Severn and Wye Railway Company (a)*. The undertakers ought to be considered as trustees or public officers, like commissioners of sewers, or trustees of a turnpike road.

The cases relied upon by the other side are distinguishable. In *Rex v. Cardington (b)*, the rate was imposed on the sluices which were vested in the proprietors. In *Rex v. Palmer (c)*, the grantee was to enjoy the cuts in as ample a manner as if the same had been conveyed to him; and in *Rex v. The Earl of Portmore (d)*, the company had the soil vested in them. In *Rex v. M'Donald (e)*, the trustees were in the occupation of the locks. Then as to the cuts, there is no distinction between them and the bed of the river, for the undertakers have a mere right of making those cuts in the soil of another. The same observation applies to the sluices. They are not distinguishable from sluices made by commissioners of sewers.

Cur. ado. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court.

In this case the rate was imposed in respect of locks, sluice, and land covered with water, and for profits arising from the same. The sessions on appeal amended the rate by striking out the words, "*land covered with water.*" The question in this case was precisely the same as that in *The King v. The Company of Proprietors*

(a) 2 B. & A. 646.

(b) *Cowper*, 581.

(c) 1 B. & C. 546.

(d) 1 B. & C. 551.

(e) 12 East, 324.

of

of the Irwell and Mersey Navigation. We were of opinion in that case, that the land covered with water was not in the occupation of the company of proprietors of the *Irwell* and *Mersey* navigation, and, therefore, that they were not rateable in respect of the same; and upon the same ground in this case, we are of opinion that the proprietors of the navigation are not occupiers of the land covered with water, being part of the river *Avon*, and are not liable to be rated in respect of the same; and, consequently, the court of quarter sessions properly amended the rate by striking out the words, "land covered with water, being part of the river *Avon*." We agree with the quarter sessions in deciding, that the cut or navigable canal which was actually made by this company upon land purchased by them, and the lock which is erected on such land, are according to all the authorities fit subjects to be rated for the poor; and this our opinion being conformable to that of the quarter sessions, the effect is, that the rule for setting aside the order of the court of quarter sessions must be discharged.

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Order of sessions confirmed.

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*Reeves v. Cully, q. ad. ill. sp.*Wednesday,
February 11th.FREAKLEY *against* EDWARD FOX.

Where the payee and holder of a promissory note appoints the maker his executor, the debt is discharged, and no action can be maintained on the note, even by a person to whom the executor has indorsed it.

ASSUMPSIT. The first count of the declaration stated, that the defendant on, &c. made his promissory note, and thereby promised to pay on demand to one *R. Reeves* in his lifetime, since deceased, or order 300*l.* and interest, and delivered the note to *Reeves*. That *Reeves*, made his will, and appointed *E. C., C. C., E. A.*, and *Edward Fox* executors thereof; and *Reeves* afterwards died, and thereupon the said *E. C., C. C., E. A.*, and *Edward Fox* duly proved the will, and took upon themselves the burden of the execution thereof; and afterwards, and before the indorsement hereinafter next mentioned, to wit, on, &c. *C. C.*, one of the said executors died, and the said *E. C., E. A.*, and *Edward Fox*, so being surviving executors of the last will and testament of *Reeves*, afterwards, to wit, on, &c. as such surviving executors, indorsed the note to the plaintiff, whereby, and by force of the statute, &c. defendant became liable to pay the money in the note specified to the plaintiff. The second count varied only by stating the indorsement to have been made by *E. A.*, being one of the executors of *Reeves*. The defendant pleaded, thirdly, that *R. Reeves*, the testator; on, &c. duly made his last will, and thereof constituted and appointed the defendant, together with *E. C., C. C., E. A.* joint executors, and died, without altering or revoking his said will; and that afterwards, and after the death of *Reeves*, and before the said supposed indorsement of the said promissory notes, defendant duly proved the will of
Reeves,

Reeves, and took upon himself, together with *E. C.*, *C. C.*, and *E. A.* the burden of the execution thereof. Replication, that *Reeves* by his said last will, after giving and bequeathing divers legacies to divers persons, gave all the residue of his personal estate to the said *E. C.* and *C. C.*, their executors, administrators, and assigns, in equal shares, and that *Reeves* did not by his said will forgive the said defendant the said debts due to him upon and by virtue of the said promissory notes, and did not, in or by his said will, or by making the defendant one of the executors thereof, release or intend to release to him the said defendant the said debts, or either of them; and that the said several sums of money in the said notes mentioned, being and remaining respectively due, owing, and unpaid, the said defendant, after the death of the said *Reeves*, and before the said indorsements of the said notes, or either of them, to the plaintiff as aforesaid, to wit, on, &c. recognized and confirmed the said notes as valid and subsisting, and paid to the said co-executors certain sums of money as and for, and then and there being interest on the said sums of money in the said notes specified, to wit, &c. And that after the said payments of interest, the said *E. C.*, *E. A.*, and defendant, indorsed the said note in the first count mentioned, and *E. A.* indorsed the note in the second count mentioned, to the plaintiff, as in the first and second counts respectively is alleged. Demurrer and joinder.

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Campbell in support of the demurrer. The plea is a good answer to both the counts on the promissory note, and the replication does not give any sufficient answer to it. In the declaration, the defendant is charged as

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maker of the note. It is not stated that the defendant indorsed the note. If it had been averred that *the defendant Edward Fox* indorsed the note, he could not have pleaded in abatement the non-joinder of his co-executors; it is clear, therefore, that the charge is not against him as executor. The allegation that *the defendant* indorsed the note, is for the first time introduced in the replication. If that is meant to charge him as executor, it is a departure from the declaration. But, assuming that it may be held that the first count charges the defendant as an executor indorsing the note, the action is not maintainable; for the holder, by appointing the maker his executor, extinguished the debt, and there was no interest in the note which the executors could assign, *Wankford v. Wankford* (a), *Cheetham v. Ward* (b), *Sir John Nedham's case* (c), where a distinction is taken between the appointment of a debtor to be executor or administrator. The former, being the act of the creditor, extinguishes the debt; the latter, being the act of the ordinary, does not. Then, as to the indorsement by one executor as alleged in the second count, it is true, that in *Rawlinson v. Stone* (d), it was resolved, after much debate, that an administratrix might indorse a promissory note; but there is no authority for saying that an indorsement by one of several executors can make them all personally liable.

F. Pollock contra. The plaintiff is entitled to proceed against this defendant either as maker or indorser of the promissory note. It is argued on the other side, that

(a) 1 *Salk.* 299.(b) 1 *B. & P.* 630.(c) 8 *Co.* 134.(d) 3 *Wils.* 1.

the appointment of a debtor as executor to the creditor is a release of the debt; but that doctrine does not apply to negotiable instruments. That the debt is not absolutely released is clear; for in equity the executor is held to be a trustee of the amount for the payment of debts or legacies, *Berry v. Usher* (a). But the remedy by action is gone, and on that account the idea of the debt being released has prevailed, *Com. Dig. Release* A 2. *Co. Lit.* 264 b. And it will be found that *Wankford v. Wankford*, and all the cases upon the subject, relate to debts not transferable. Now, although in general the action is gone, for the technical reason that an executor cannot sue himself, that does not apply where by indorsement the right of action may be vested in a third person. As to an indorsement by one of several executors, that must be sufficient in order to transfer the property in the note, as well as to release a debt, or convey a term of years; and this objection is only applicable to the second count.

Cur. adv. vult.

The judgment of the Court was now delivered by Lord TENTERDEN C. J., who, after stating the pleadings, proceeded as follows: On behalf of the defendant it was contended, that by the appointment of the maker to the office of executor of the creditor, the note was discharged; so that an indorsement, even by the debtor himself, could not set it up and make it a binding instrument; and we are of that opinion. The expression used in the cases of *Wankford v. Wankford*, and *Cheetham v. Ward*, is that the debt is discharged. It is considered

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(a) 11 Ves. 87.

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to have been paid by the executor to himself, and becomes assets in his hands. Upon this supposition the rule in equity depends which makes the executor accountable for the amount of his debt as assets. Upon the ground that the debt is gone, our judgment in this case must be for the defendant.

Judgment for the defendant.

PELLEW *against* The Inhabitants of the Hundred of WONFORD in the County of DEVON.

In an action against the hundred on the 9 G. 1. c. 22., to recover damages for the injury done to premises maliciously set on fire: Held, first, that a reversioner may sue for the injury which he has sustained; secondly, that if no servant of his had the care of the premises, he is the proper person to give in the examination; thirdly, that he is not bound in such examination to state his suspicions as to the offender; fourthly, that the two days allowed by the statute for giving notice of the offence are exclusive of the day on which the fire happens.

THIS was an action on the case, brought to recover satisfaction for damage by fire to certain barns and outhouses, which were described in the declaration as being at the time of the fire in the occupation of one *John Otton*, and the reversion whereof, after a certain term of years then running and unexpired, was then and there belonging to the plaintiff. At the trial before *Park J.* at the Spring assizes, 1827, for the county of *Devon*, the plaintiff was nonsuited, subject to the opinion of this Court on the following case: The plaintiff before and at the time of the fires hereinafter mentioned, was and still is the proprietor of an estate called *Canonteign*, in the parish of *Christow*, and within the hundred of *Wonford*, and county of *Devon*. Upon this estate stood a large house, formerly a mansion, but for many years past used as a farm-house; and this house, with an extensive range of barns and other outhouses belonging thereto, formed the Barton of *Canonteign*. The house, barns, and outhouses, except one stable and another of
the

the outhouses used as a dog-kennel, long before and at the time of the fire, were in possession of *John Otton*, as tenant to the plaintiff; *Otton*, with his wife and family, residing in the house, and occupying the greater part of it. The other part of the house was occupied by *John Pennington*, the plaintiff's gamekeeper, who had lived there some years with his wife and family; and he also used the said stable and dog-kennel, but had nothing to do with the other outhouses. The plaintiff himself resided at *Stokelake*, in the parish of *Hennock*, about four miles from *Canonteign*. On the morning of *Saturday* the 9th of *July* 1825, the plaintiff, with some other gentlemen, his friends, went from *Stokelake* to *Canonteign* Barton; and, taking *Pennington* with them, were afterwards engaged in shooting rabbits in a part of the estate distant about a quarter of a mile from the Barton, on the top of a high hill, which commanded a view of the mansion and of all the outbuildings. While they were so engaged, at about two o'clock P. M., fires were observed to break out in several parts of the premises, first in one of the barns, and then in another barn distant 300 yards from the first; afterwards in the dog-kennel, which was separated from the said last-mentioned barn; and then in other of the outbuildings. The fires were immediately seen by the plaintiff, and he, as well as the persons with him, hastened to the spot, and were actively employed for a considerable time in endeavouring to extinguish the flames. The barns and outhouses were, however, burnt down. The plaintiff did not leave the place till about five o'clock P. M., when it was supposed the fire had been subdued; but it broke out again in part of the ruins, and was burning a little between one and two

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o'clock on the following morning. On the day of, and long previously to the fire, *Otton*, his wife and family, and *Pennington* and his wife and family, were all living upon the premises as aforesaid; and *Otton* had in his employ upon the premises several farming servants. *Otton* and several other persons known to the plaintiff were present in the Barton, amongst the buildings, when the fire broke out, and when the plaintiff, his friends, and *Pennington*, came there from the hill; and one of those persons, not a servant of *Otton's*, shortly afterwards discovered a ball of flax on fire under some straw in one of the outbuildings, not then in flames; of which fact the said plaintiff was then informed. The damage done to the barns and other outhouses in the possession of *John Otton* greatly exceeded the sum of 200*l.*, and the fire was wilful and malicious. The plaintiff, on the evening of the same day after his return home, mentioned to one of his friends the name of a person whom he suspected to be the author of the fire, and he retained the same suspicion long after the time of his examination hereinafter mentioned. On *Monday* the 11th of *July*, before two o'clock P.M., notice of the offence was given by the plaintiff to four inhabitants of the village of *Christow*, that being the nearest village to *Canonteign*, and in the same parish. On the 14th of the same month the plaintiff gave in his examination upon oath to a magistrate of the county, being the magistrate resident nearest to *Canonteign*, at the distance of about a mile and a half from that place. The examination stated, "that on *Saturday* last, the 9th day of this instant *July*, the barns and outhouses, part of the Barton of *Canonteign*, situate in the parish of *Christow*, in the hundred of *Wonford*, and said county
of

of *Devon*, and now in the possession of *John Otton*, and the property of him the said *Pownall Bastard Pellew*, were unlawfully, wilfully, maliciously, and feloniously set on fire; and this deponent further saith, that he does not know the person or persons who committed the said offence, or any of them.

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—
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against
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ants of
WOMFORD.

“*Pownall Bastard Pellew*.”

No other person was examined.

At the following *Christmas*, *Otton* gave up his interest in the estate, and the plaintiff took possession of it. The repairs which have been done to the buildings injured or destroyed by the fires, have been done under the plaintiff's orders, and at his expense. The offenders have not been apprehended and convicted of the above mentioned offence, nor any one of them. This action was commenced against the hundred within one year next after the offence had been committed.

Praed for the plaintiff. Four objections will be raised to the plaintiff's right to recover in this action. First, that a reversioner cannot sue. Secondly, that the notice was not given in time. Thirdly, that the plaintiff was not the proper person to be examined. Fourthly, that he ought to have stated his suspicions to the justice who took the examination. As to the first, it is clear that an injury was done to the plaintiff's reversionary estate; he could not have sold it after the fire for the same price as if the barns had continued in repair; and for such an injury a reversioner may in general sue, *Jesser v. Gifford* (a); and the statute 9 G. 1. c. 22. s. 7. which gives the action against the hundred, makes no

(a) 4 Burr. 2141.

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distinction between interests in possession and in reversion, but gives the remedy generally "to all and every the person and persons for the damages they shall have sustained or suffered." The second objection depends upon the eighth section of the act, which provides, "that no person or persons shall be enabled to recover any damages by virtue of this act, unless he or they by themselves or by their servants, within two days after such damage or injury done him or them by any such offender or offenders as aforesaid, shall give notice of such offence, &c. and shall within four days after such notice, give in his, her, or their examination upon oath; or the examination upon oath of his, her, or their servant or servants that had the care of his, her, or their houses, outhouses, &c. before any justice of the peace of the county, &c. where such fact shall be committed, inhabiting within the said hundred where the fact shall happen to be committed, or near unto the same; whether he or they do know the person or persons that committed such fact, or any of them," &c. The objection is, that the day on which the fire happened is to be reckoned as one of the two days allowed by the statute for giving notice; and consequently the notice on *Monday*, of the fire which happened on *Saturday*, was too late. This objection is founded on a note to *Pinkney v. The Inhabitants De Rotel* (a), in which it is said, that the day on which a robbery is committed is included in the year allowed by the statute 27 *Eliz. c. 13. s. 9.* for commencing an action against the hundred, and *Norris v. The Hundred of Gawtry* (b) is cited as an authority. That, however, was only the decision of

(a) 2 *Wms. Saund.* 315. n. (3).(b) *Hob.* 139.

two, *Hobart C. J.* and *Winch J.* against the opinion of *Warburton J.* In *Nesham v. Armstrong* (a), which was an action upon the 9 G. 1. c. 22. it appeared that the injury was committed on the 20th of *March*; the notice was given on the 22d, and no objection was raised to it as being too late. Upon the 27 H. 8. c. 16. requiring bargains and sales to be enrolled within six months after the date, that is held to be exclusive of the day of the sale, 2 *Inst.* 674. and the twenty days allowed by the 17 G. 3. c. 26. s. 3. for enrolling annuity deeds, have been held to be exclusive of the day of execution, *Ex parte Fallon* (b). There are certainly decisions upon other statutes, apparently inconsistent with these; but all the cases were cited and considered by Sir *W. Grant* in *Lester v. Garland* (c), and the rule which he adopts is to exclude the day of the act done, unless it be an act to which the person affected by the computation is party or privy. Here it must have been the intention to give the party injured two whole days for giving the notice. If those days expired on the *Sunday*, it must be said that the fire happened on *Friday*, which is contrary to the fact. Thirdly, the plaintiff was the proper person to be examined. The statute requires that "the party injured, or his or her servant, who had the care of the premises," shall be examined. The plaintiff was the party injured, and he had no servant who had the care of the premises. In *Nesham v. Armstrong*, and *Duke of Somerset v. Mere* (d), the examination was held to be insufficient, because in the first case only one of the several parties was examined; in the second, neither the

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FALLON
against
The Inhabit-
ants of
Worcester.

(a) 1 B. & A. 146.

(b) 5 T. R. 283.

(c) 15 Ves. 247.

(d) 4 B. & C. 167.

party

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—
 FELLEW
 against
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 ants of
 WOXFORD.

party injured, nor the servant having the care of the premises, but a steward, who lived several miles off, was examined; they are, therefore, wholly different from this case. As to the fourth point, the plaintiff clearly was not bound to state his suspicions. In many cases it would be extremely unjust to state them, and the statute does not require it. The words of the statute require that he should state whether he knows the person that did the act. No case hitherto decided has required more, and that was complied with in the present instance, *Thurtell v. The Hundred of Mutford* (a), *King v. The Hundred of Bishops Sutton* (b).

Follett contra. The plaintiff had not any such interest in the premises as entitles him to recover against the hundred. The party in possession is clearly entitled to sue, and the legislature did not, by the words "all and every the person and persons," in the seventh section, mean to give a remedy to several, having distinct interests, but to all who had a joint interest. It could not have been intended to impose several penalties on the hundred in respect of one offence. If then only one sum of 200*l.* is to be recovered, there is no mode in which it can be apportioned between several persons in respect of their several interests. The person to sue must be the person against whom the malice of the perpetrator of the act is directed, and that must be taken to be the person in possession, *Curtis v. The Hundred of Godley* (c). As to the second point, the cases of *Ex parte Fallon*, and *Lester v. Garland*, were not determined upon such statutes as this, which is

(a) 3 *East*, 400.(b) 2 *Str.* 1247.(c) 3 *B. & C.* 248.

extremely

extremely penal against the hundred. According to the older cases determined before and about the time when the act was passed, notice should have been given on *Sunday*, *Norris v. Hundred of Gawtry*, *Bellasers v. Hester* (a), *Rex v. Adderley* (b); and in *Glassington v. Rawlins* (c), also, it was recognised as a general rule, that where the computation is to be made from the time of an act done, the day on which it is done is to be included. Thirdly, the examination of the plaintiff alone was not sufficient; the statute must be construed as if the words were, "the person having the care, or the servant having the care," shall give in his examination; the object of the statute being, that all information shall be given which may enable the hundred to convict the offender within six months, in which case they are exonerated from all liability by the ninth section of the act. Accordingly it has been held, that such persons must be examined as are most likely to know the offenders, *Duke of Somerset v. Mere* (d). In this case *Pennington* and the tenant were much more likely than the plaintiff to know the offender; they, therefore, ought to have been examined. Fourthly, the examination ought to have contained a statement of the plaintiff's suspicions. However strong and well founded suspicions may be, a person may almost always safely swear that he does not know the offender. According to the *King v. Bishop's Sutton*, the plaintiff should have stated, "I suspect *A. B.*, but do not know that he committed the act." That would have given the hundred a fair chance of ascertaining whether *A. B.* was or was not the offender.

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PELLEW
against
The Inhabit-
ants of
WIMBORNE.

(a) 1 *Ld. Raym.* 280.(c) 3 *East*, 407.(b) *Doug.* 485.(d) 4 *B. & C.* 167.

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PELLEW
against
The Inhabit-
ants of
Wentford.

Praed in reply. The statute does not say that the hundred shall not be liable to pay more than one sum of 200*l.*, but that the damages to be recovered in any particular action shall not exceed that amount. As costs are allowed to the plaintiff wherever the verdict is for 200*l.*, the whole sum for which the hundred are liable must exceed that amount, *Jackson v. The Hundred of Calesworth (a)*.

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord TENTERDEN C. J., who, after stating the case, proceeded as follows: Several objections were taken to the plaintiff's right to recover in this action. The first was, that the plaintiff, not being a person in possession of the premises, but a reversioner, could not sue. That depends upon the seventh section of the 9 G. 1. c. 22. which gives a remedy to "all and every the person and persons" injured. The expression there used is perfectly intelligible, and I cannot find any thing in the statute which can make a distinction between a party in possession and a reversioner. The latter often has a greater interest and may sustain a greater injury from a malicious act, than the party in possession. But it is said that this will enable several persons to bring actions against the hundred in respect of one and the same offence. That consequence may certainly follow, but I see no reason why more persons than one having sustained distinct injuries, should not sue and recover to the limited amount of 200*l.* in each case.

The second objection was, that the plaintiff was not

(a) 1 T. R. 71.

the proper person to give in the examination. That depends on the eighth section, which provides that no person shall recover unless he or his servant having the care of the premises injured gives in the examination. If we were to hold that the present plaintiff was not the right person to be examined, he would be altogether deprived of the power to sue, for no servant of his had the care of the premises. But the clause is in the alternative, that he *or* his servant shall be examined. Where there is no servant having the care of the premises, we must say that the examination of the party suffices, although where a servant has the care, and the master knows nothing of the transaction, the servant ought to be examined.

Another objection was, that the examination given in was insufficient, inasmuch as the plaintiff did not disclose his suspicions. I cannot find any thing in the act requiring suspicions to be stated. In many cases it might work injustice, by injuring the character of an innocent man; or it might prevent the conviction of a guilty one, by giving him notice of the suspicion, and so enabling him to escape. The magistrate may, if he pleases, enquire whether the party has any suspicions; but I think he is not bound to volunteer a statement of them.

The only remaining objection was, that the notice was not given in time. That is required to be given within two days next after the injury done. It is said that those two days are inclusive of the day on which the offence is committed, and that the notice should in this case have been given on *Sunday*, the day after the fire. Many cases were quoted at the bar, and, amongst others, *Lester v. Garland*, where all the cases upon

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upon the subject are collected. It is impossible to reconcile them all, or to deduce from them any clear rule or principle to govern all cases. In that case Sir *W. Grant*, the Master of the Rolls, a great and very learned Judge, thought the Court was at liberty to look at the particular circumstances of each individual case, and that one rule for deciding whether a certain day should be considered as excluded or included was, that where a computation is to be made from an act to be done by the party, the day of doing the act shall be included, but not otherwise. Here the computation is to be made from an act not done by the party, and of which he may at the time be wholly ignorant. Here also only two days are allowed for giving notice; if those two days expired on the *Sunday*, when would the time have expired had one day only been allowed? It could hardly have been said that the notice must be given on the very day when the fire happened; and if one day would have extended the time to *Sunday*, two days must extend it to *Monday*. Looking at the act of parliament, and the object with which it was made, viz. to give a remedy to a party injured, we think that the rule given by the Master of the Rolls may with propriety be applied to this case, and that according to that rule the notice was in time. All the objections, therefore, fail; and the plaintiff is entitled to have the nonsuit set aside, and a verdict entered in his favour for 200*l*.

Postea to the plaintiff.

Gunn. v. Birkhead & Ashill 701

1829.

BOORMAN *against* NASH.Tuesday,
February 10th.

ASSUMPSIT. The first count in the declaration was as follows:—

For that whereas heretofore, to wit, on the 7th day of *November*, in the year of our Lord 1825, at *London*, the defendant bargained for and bought of the plaintiff; and the plaintiff, at the special instance and request of the defendant, then and there sold to the defendant a large quantity, to wit, twenty-five tons of linseed oil, at a certain rate or price, to wit, &c. for each and every ton thereof, usual allowances, to be free delivered, half in the month of *February* then next, and the remainder in the month of *March* then next, and paid for from each delivery, in ready money, allowing 2l. 10s. per cent. discount; half of the oil to be delivered in the last fourteen days in *February* then next, and the other half to be delivered in the last fourteen days in *March* then next; and in consideration thereof, and that the plaintiff, at the like special instance and request of the defendant, then and there undertook and faithfully promised the defendant to deliver the oil to him, the defendant, at the times and manner aforesaid, he, the defendant, undertook, &c. to accept the oil of and from the plaintiff, and to pay him for the same on the delivery thereof to him, the defendant, as aforesaid; and although the plaintiff afterwards, and at the times in the said contract in that behalf mentioned, to wit, on, &c. was ready and willing to deliver one half of the oil to the defendant, and afterwards, to wit, at

Where a person, who had contracted for a certain quantity of oil, to be delivered to him at a future day, at a certain price, became bankrupt before that day arrived, and obtained his certificate: Held, that he was nevertheless liable to an action for not accepting and paying for the oil, and that the proper measure of damages was the difference between the price which he had contracted to pay for the oil, and the market-price at the time when the contract was broken.

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the other time in the contract mentioned, to wit, on, &c. was ready and willing to deliver the residue of the oil to the defendant, usual allowances being made as aforesaid; and although the plaintiff was always ready and willing to allow such discount as aforesaid, of which premises the defendant at those respective times there had notice, and was requested by the plaintiff to receive and pay for the oil as aforesaid; yet the defendant not regarding his promise and undertaking, but contriving, &c. in this behalf, did not nor would at those times, or at any other times, accept the oil, or any part thereof, of or from him, the plaintiff, or pay him for the same, or any part thereof as aforesaid, but then and there wholly neglected and refused so to do. By reason whereof the plaintiff incurred a large expense, to wit, an expense of 20*l.* in and about the warehousing, keeping, and taking care of the oil for a long time, to wit, two months after the respective times when the oil ought to have been so accepted by the defendant as aforesaid, to wit, at *London* aforesaid.

There were other special counts, in substance the same, and counts for goods bargained and sold.

The defendant pleaded, first, non assumpsit; and, secondly, a general plea of bankruptcy: and upon these pleas issue was joined. At the trial before Lord *Tenterden* C. J. at the *London* sittings after *Trinity* term 1827, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:—

The plaintiff is a seed crusher, doing business under the firm of *T. H. Boorman* and Co., and the defendant was a partner in the bank of *Hollick* and Co., at *Cambridge*, and also carried on business on his own account in the oil trade.

: On

On the 7th of *November* 1825, the plaintiff and defendant entered into a contract in writing, and duly signed by an authorised agent of both parties, of which the following is a copy: —

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against
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“ *London*, 7th *November* 1825.

“ Bought this day, by order of *Thomas Nash*, of *T. H. Boorman* and Co., twenty-five tons linseed oil, at 24l. 5s. per ton, usual allowances, to be free delivered, half in the month of *February* next, and the remainder in the month of *March* next, and paid for from each delivery in ready money, allowing two and a half per cent. discount.

“ Half the above to be delivered in the last fourteen days in *February*, and the other half to be delivered in the last fourteen days in *March* next.”

On the 28th of *February* 1826, twelve tons and a half of oil, being one half of the linseed oil mentioned in the contract, were duly tendered by the plaintiff to the defendant, and payment demanded for the same, and discount offered to be allowed at the rate of two and a half per cent.; but the defendant would not receive and pay for the oil then tendered as afore-said. On the 31st of *March* a like quantity of the said linseed oil was duly tendered by the plaintiff to the defendant, and payment demanded for the same, and two and a half per cent. discount offered to be allowed; but the defendant refused to accept and pay for the last-mentioned twelve tons and a half of linseed oil then tendered.

On the 31st of *March* the plaintiff caused a notice in writing to be served on the defendant, that in consequence of his not having cleared and paid for the

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twenty-five tons of linseed oil according to contract, the same would be resold, and that the defendant would be held liable to all differences in price, charges, interest of money, and every other expense that might arise in consequence of the non-fulfilment of the said contract. And the entire quantity of linseed oil was resold on different days in *April*, at 17*l.* 10*s.* per ton, of which notice was given by the plaintiff to the defendant; such 17*l.* 10*s.* per ton being a fair market price at the time of such resales.

Shortly after the resales were completed, that is to say, on or about the 29th day of *April* 1826, an invoice and account sales was rendered by the plaintiff to the defendant, by which it appeared that a loss had occurred on such resales of 170*l.* 3*s.* 2*d.*

A commission of bankrupt under the Great Seal of *Great Britain*, bearing date the 7th of *January* 1826, was awarded and issued against the defendant, together with *Ebenexer Hollick*, *William Searle*, and *Thomas Nash* the younger, under which they were duly found and declared bankrupts, and the defendant hath since obtained his certificate of conformity.

On the 7th of *January* 1826, the oil might have been sold in the market at 21*l.* 10*s.* per ton.

The questions for the opinion of the Court were, Whether the defendant's bankruptcy and certificate were a bar to the plaintiff recovering in this action? and if not, then what was the proper measure of the damages which the plaintiff was entitled to recover?

The case was argued on a former day in this term by *Alderson* for the plaintiff. According to the law of bankruptcy, as it stood before the statute 6 G. 4. c. 16.,

a de-

a demand resting in damages only could not be proved under the commission, unless those damages could be ascertained by the commissioners without the intervention of a jury, *Utterson v. Vernon* (a). In the present case, a bargain was made for a certain quantity of goods, at a certain price, to be delivered at a day which had not arrived when the commission issued. Until that day arrived, it was impossible to ascertain whether any damage had been sustained, for that would depend upon the then state of the market. The commissioners could not predict whether there would be a fall or rise. In the latter event the vendor would have been a gainer by the refusal of the bankrupt to complete his contract. Then has this been altered by the 6 G. 4. c. 16. s. 56. (b) The debts intended to be provided for by that section are ascertained in amount, but payable on a contingency, as, for instance, upon survivorship, &c. the value of the debt so payable is easily ascertained by computation, and, therefore, may be proved. But in *Atwood v. Partridge* (c), it was held, that under this section a right to maintain an action of covenant for unliquidated damages was not a contingent debt capable of proof.

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against
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(a) 3 T. R. 539. 4 T. R. 570.

(b) By which it was enacted, that if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency, which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed.

(c) 4 Bingh. 209.

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Secondly, supposing the bankruptcy and certificate not to be a bar to the action, the amount of damages should be ascertained by the difference between the price contracted to be paid by the defendant for the oil, and the market price at the time when the contract was broken by him, *Leigh v. Patterson* (a), *Gainsford v. Carroll* (b). And this difference may be recovered as a loss necessarily arising out of the breach of contract, although it is not stated as a special damage in the declaration.

Follett contra. The certificate obtained by the defendant is a bar to this action. The declaration states, that the defendant bargained for and bought of the plaintiff, and the plaintiff sold to the defendant twenty-five tons of linseed oil at a certain price, to be delivered on certain specified days. The case does not find this to have been parcel of a larger quantity of oil, nor that any thing remained to be done by the seller except the delivery of the oil. An action for goods bargained and sold, might, therefore, have been maintained to recover the price. If so the price of the goods, although payable at a future day, was a debt proveable under the commission by the 6 G. 4. c. 16. s. 51., and the claim for consequential damages as well as for the price is barred by the certificate, *Van Sandau v. Corsbie* (c). In *Hanson v. Meyer* (d), it was held, that trover could not be maintained by the assignees of a bankrupt to recover goods contracted for by him, only because something remained to be done by the seller before they could be removed. And in *Rugg v. Minett* (e), it was held that the property passed immediately, although the goods were to be delivered and paid for on a future day.

(a) 8 Taunt. 540.

(b) 2 B. & C. 624.

(c) 3 B. & A. 13.

(d) 6 East, 614.

(e) 11 East, 210.

[Lord *Tenterden* C.J. There it was found as a fact that the seller was in possession of the goods at the time of the sale.] Supposing an action for goods bargained and sold could not have been maintained, still the damages might be proved under the fifty-sixth section. There was nothing to prevent the commissioners from setting a value upon the debt as directed by the first part of that section, and the latter branch removes all difficulty; for it provides, that if the value is not ascertained, and the contingency happens, then after the contingency has happened, the creditor may prove his debt. Here, therefore, after the days for delivery of the oil had passed, the plaintiff might clearly have proved under the commission, and is, therefore, barred. Lastly, the declaration does not state any resale of the oil or fall in the market, but merely the payment of warehouse rent. It is not necessarily to be inferred that the market fell, and that the goods were sold at a loss; and if so, this cannot be recovered under the general allegation of damage, but ought to have been specially pointed out.

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Alderson in reply. It is true that consequential damages follow the principal debt, but here no debt existed at the time of the bankruptcy. An action for goods bargained and sold could not have been maintained, no specific goods having been contracted for. As to the proof after the happening of the contingency, that merely applies to such debts payable on a contingency as are mentioned in the first branch of the section, and not to a case where it is uncertain whether any damage will ever be sustained.

Cur. qdo. vult.

The

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The judgment of the Court was now delivered by Lord TENTERDEN C. J., who, after stating the facts of the case, proceeded as follows: The right of the plaintiff to maintain this action depended upon the question, whether he could or could not have proved his demand under the commission of bankrupt issued against the defendant? It appears to us impossible that he should so prove it; for at the time when the commission issued, it was uncertain not only what amount of damage, but whether any damage would be sustained. And, therefore, unless we can say that the bankruptcy of the defendant rescinded the contract, he must remain liable to it. Now, the assignees, if they had thought fit, might have performed the contract made by the defendant, and have insisted upon the delivery of the oil, and no doubt they would have done so had the bargain proved beneficial to the estate. It is, therefore, impossible to say that the contract was rescinded, and it is equally impossible to say that the amount of damage could be ascertained and proved; for that could only be determined by the state of the market at a future day. For these reasons we think that the action is maintainable; and although it is not specially alleged in the declaration that the goods were of less value at the time when the contract was broken, yet as the damage sustained by the fall of the market necessarily resulted from the defendant's breach of contract, that damage may be recovered under the declaration in its present form. The amount of the damage sustained, must, therefore, be ascertained by the difference between the price which the defendant contracted to pay, and that which might have been obtained for the oil on the days when the contract ought to have been completed.

Postea to the plaintiff.

1829.

CLARKE *against* PALMER.

ON the 14th of *November* 1828, the attorney of the plaintiff lodged a ca. sa. with the sheriff of *Kent*, indorsed to levy 470*l.*, returnable in fifteen days of *St. Martin*, and desired to have a warrant directed to *Morris*, an officer at *Greenwich*. There was no description of the defendant's address or place of residence indorsed upon the writ, but the plaintiff's attorney informed the under-sheriff that the defendant was travelling about the county of *Kent*; that he did not know where he was, but would endeavour to learn and inform *Morris* the officer. On the same day a writ of latitat into *Kent*, which had issued on the 12th, at the suit of one *Thomas Bird* for 40*l.*, was lodged with the under-sheriff, and a warrant was directed to *Hoskins*, a bailiff at *Tonbridge Wells*, and he arrested the defendant on the 15th. The defendant paid the debt and costs in that action. *Hoskins* demanded one guinea and a half. The defendant objecting to the amount, *Hoskins* said he was entitled to detain him two days, until he had searched the office. The defendant then paid the money and was discharged. The plaintiff on the first day of this term had obtained a rule for the sheriff to return the writ of ca. sa. The sheriff on the 29th of *January* obtained a rule for setting aside the ca. sa. for irregularity, on the ground that the addition and place of

The plaintiff's attorney lodged a ca. sa. with the under-sheriff, without indorsing the place of abode or addition of defendant's, and requested the under-sheriff to direct his warrant to a particular officer, and he would inform him where the defendant was. A latitat having been issued against the same defendant, he was arrested by a different officer, and discharged upon paying debt and costs. The officer demanded, and received one guinea and a half, and observed, that he might have kept the defendant in custody for two days until he searched the office. The Court, under these circumstances, set aside the ca. sa., on the ground that the rule of court had not

been complied with, and that if the writ were suffered to remain in force, and the sheriff compelled to make a return, he might be subjected to the peril of an action for an escape.

abode

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abode of the defendant were not in due form indorsed on the writ, and for discharging the rule for returning the writ with costs.

Campbell now shewed cause. The rule of court of the 2 & 3 G. 4. requires that the plaintiff's attorney shall upon every writ of *capias ad satisfaciendum* indorse the place of abode and addition of the party against whom the writ is issued, or such other description of him as such attorney may be able to give. It does not make the writ a nullity if the place of abode be not indorsed on the writ. The sheriff having granted the warrant is estopped from saying that the writ is bad. If he had returned *non est inventus*, it might perhaps have admitted of doubt whether he would have been liable to an action for an escape. Here the sheriff's officer was guilty of misconduct by taking a bribe. The sheriff is identified with the officer, and therefore is not entitled to any favour.

Gurney contra. The plaintiff's attorney has not complied with the rule of Court. If he did not know the place of abode and addition of the party, he ought, in pursuance of the rule of Court, to have indorsed such other description as he was able to give. Here he merely left a message at the sheriff's office. Besides, he had released the sheriff from responsibility, by desiring to have the warrant directed to a particular officer to whom he was to send directions.

Lord TENTERDEN C. J. I think that, under the circumstances of this case, the Court ought to set aside the writ. The rule of Court certainly contains no words
of

of avoidance; and I by no means lay it down as a general proposition, that in all cases where a writ has been lodged by the plaintiff without the indorsement required by the rule of Court, and the sheriff has received that writ without objection, the Court will interpose and set aside the writ. But where we see that the rule has not been complied with, and that by the conduct of the plaintiff the sheriff may be placed in a situation in which justice requires that he should not be placed, if we leave the writ to stand, I am of opinion that we ought, in order to prevent such a consequence, to set aside the writ. The plaintiff's attorney obtains a warrant to an officer named by himself: he is to give directions to that officer; he gives none; but it is afterwards discovered, that in another part of the county another officer, having a process against the same defendant, being informed where he may be found, contrived to arrest him. I do not say whether an action for an escape would or would not succeed; but I think that the sheriff ought not to be exposed to the risk of such an action. The plaintiff, although he could not give the place of abode or addition of the defendant, must have known something about him, for he had sued him, and had got judgment. He gives no information; and now seeks to avail himself of the accidental circumstance of the party having been found in another part of the county, in order to bring an action against the sheriff for an escape. Under the very peculiar circumstances of this case, I think that justice requires that the writ should be set aside.

Rule absolute for setting aside the writ, but without costs.

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CLARK
against
PALMER.

1829.

Thursday,
February 12th.

FRANKLIN *against* The Bank of ENGLAND.

Where the proprietor of stock in the public funds makes a specific bequest of it: Held, that the Bank of England must nevertheless allow the executor to make a transfer of it, unless it be shown that he has assented to the legacy.

THE Lord Chancellor directed the following case to be stated for the opinion of this Court:—

John Franklin, by his will bearing date the 29th November 1822, attested by three witnesses, gave, devised, and bequeathed unto *Thomas Franklin* the manors, messuages, lands, freehold, leasehold, and copyhold estates, hereditaments, and premises therein mentioned and described, to hold the same unto the said *Thomas Franklin* for the term of his life, without impeachment of waste; and after the decease of the said *Thomas Franklin*, the said testator gave, devised, and bequeathed the same unto *George Jones Bevan* and his heirs, to the uses therein and hereinafter mentioned, that is to say, to the use of the said testator's grandson, *Richard Franklin*, who was the son of the said *Thomas Franklin*, and his assigns for his life, without impeachment of waste; with remainder to the use of the said *George Jones Bevan*, in trust to preserve contingent remainders; with several remainders and limitations over in tail, in favour of the issue of the said *Richard Franklin* and of the said *Thomas Franklin*, and with the ultimate limitation to his (the testator's) own right heirs. And the said testator, in and by his said will, gave and bequeathed all the monies which he might have at the time of his decease in the 3 per cent. Consolidated Bank annuities, or any other public funds, unto his cousin *Catharine Bevan*, spinster, since deceased, and the said *George Jones Bevan*, and the survivor of them, upon the trusts, and

to

to and for the several uses, intents, and purposes therein and hereinbefore mentioned and referred to, concerning his real estates thereinbefore devised, or as near thereto as the nature of the respective estates would admit; and after giving certain legacies of trifling value therein mentioned, the said testator, by his said will, gave, devised, and bequeathed all the rest, residue, and remainder of his goods, chattels, real and personal estate whatsoever and wheresoever, subject to the payment of his just debts, funeral and testamentary expenses, the foregoing legacies, and also such other legacies as he might bequeath, in and by a codicil which the said testator declared he intended to add to that his will, unto the said *Thomas Franklin*, his heirs, executors, administrators, and assigns, to and for his and their own use absolutely; and he thereby nominated and appointed the said *Thomas Franklin* sole executor thereof. By a codicil to his will, dated the 28th November 1824, executed in the presence of and attested by two witnesses, the said testator, amongst other things, bequeathed unto the said *Richard Franklin* the sum of 10,000*l.*, with the payment of which sum he charged all his real and personal estate devised and bequeathed by his said will; and he thereby, in all other respects, confirmed his said will. The sum of 16,000*l.* Consolidated 3 per cent. annuities was standing in the name of the testator, *John Franklin*, in the books of the Bank of England on the 29th November 1822, the date of his will, and on the 22d March 1823, the further sum of 500*l.* like annuities was transferred into the name of the said *John Franklin* in the books of the said company, making together the sum of 16,500*l.*; and on the 29th November 1824, the said *John Franklin* died, with-

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out having revoked or altered his said will or codicil; and the said sum of 16,500*l.* Consolidated 3 per cent. annuities continued to be and was standing in the name of the said testator, *John Franklin*, until and at the time of his death. *Thomas Franklin*, the executor, on the 30th day of *December* 1824, proved the said will and codicil in the prerogative court of *Canterbury*, and on the 2d day of *January* 1825 caused the same to be registered in the books of the Bank, when an extract of so much as related to the said annuities was duly entered: On or about the 3d day of *February* 1825 *Thomas Franklin* demanded permission of the Bank to transfer the whole of the said annuities to such persons as he should think fit, to enable him to pay the testator's debts and legacies, when the officers of the Bank refused to permit him to make such transfer, on the ground and by reason that the said sum of stock ought to be transferred into the names of the said *Catharine Bevan* and *George Jones Bevan*, to whom the same is given and bequeathed in and by the said will. A bill has been filed by the said *Thomas Franklin* in the High Court of Chancery, to compel the Bank to allow the said plaintiff to sell and transfer the said stock. No evidence was given in the suit that there were any debts due or owing by the said estate at the time of such demand. The question for the opinion of the Court was, Whether, under the circumstances above stated, *T. Franklin*, the executor, has any right of action against the Bank for not permitting the transfer by him of the said 16,500*l.* 3 per cent. Consols.

Alderson for the plaintiff. By the statutes relating to the 3 per cent. Consolidated Bank annuities, and other public

public funds, they are made personal estate (a). Such property must, therefore, be subject to all the consequences of being personal estate; and the first of those is, that the property, although specifically devised by the testator, vests in the executor until he assents to the legacy. Many difficulties will arise from a contrary rule. It cannot be contended that the property does not vest in the executor when there is no specific devise, and whether a devise be specific or not is often a very difficult question; and if the Bank directors are right in transferring to the specific devisee and not to the executor, they must take upon themselves to determine that question. Again, this being personal estate, is assets for payment of the testator's debts, and would be so held in an action against the executor; now it would be very unjust that he should be unable to plead *plene administravit*, and yet be unable to use the assets for payment of the testator's debts. Again, in *Deeks v. Strutt* (b), it was held, that an executor cannot be sued at law for a legacy, but that it must be recovered by suit in equity; and the reason for this rule is, that in the case of a legacy being left to a married woman the husband may be compelled to consent to a proper settlement. This reason is equally applicable to a bequest of stock; but the rule will not apply if it be held that the stock vests in the devisee, and not in the executor until he assents to the legacy. The point has been several times mentioned, but never decided. In *The Bank of England v. Lunn* (c), the opinion of the Lord Chancellor appears to have been, that the stock vested in the executor.

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against
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(a) 7 Ann. c. 7. 1 G. 1. c. 19.

(b) 5 T. R. 690.

(c) 15 Ves. jun. 569.

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Bosanquet Serjt. contrà. In *The Bank of England v. Parsons* (a), Lord *Rosslyn* decided that the Bank directors are not bound to look to the trusts of a will, and that relieved them from much difficulty. If this court now decides that they are not bound to enquire whether an executor has assented to a specific legacy or not, but may at once transfer the stock to the executor, that also will relieve them from much difficulty. But if they are bound to transfer to the executor if he has not assented, but not otherwise, they will be much embarrassed in the management of the public funds. For in the case of a specific bequest of personal property, if the executor assents, the property immediately vests in the devisee, and he has a right of action for it. Suppose, then, a will is brought and entered at the Bank, and the executor applies to make a transfer of the stock, he is answered that it has been specifically devised; but, upon his statement that he has not assented to the bequest, the transfer is allowed. Afterwards the devisee shews a previous assent by the executor to the bequest, and thus the Bank, although they could not possibly know any thing of it before, are made liable to an action. [Lord *Tenterden* C. J. How would the law be in the case of an ordinary bequest of a chattel in the hands of a third person, if the executor assented to the legacy, and afterwards went and claimed and got possession of the chattel, could the devisee sue the party from whom it had been so taken?] According to *Doe v. Guy* (b) he might. [Bayley J. There the action was against the executor, and it did not appear that he claimed the term as assets for payment of debts.] It has never yet been decided, that

(a) 5 *Ves.* 665.(b) 3 *East*, 120.

stock is legal assets for payment of debts. [Lord *Tenterden* C. J. I believe it has never been doubted.] The nature of the property is a debt from the public to the individual. The dividends or proceeds may be assets, but the stock itself cannot be assets until it has been converted into money. [Bayley J. You cannot argue, that if a fundholder die intestate and insolvent, his next of kin can claim the stock.] A court of equity may compel a sale of it, but it is not assets at law. The present question is certainly of some difficulty, and has been so treated in various cases. In *Pearson v. The Bank of England* (a), Lord *Thurlow* appears to have been of opinion, that the stock vests in the specific devisee without the assent of the executor. In *The Bank of England v. Moffat* (b), he adopted a different rule with respect to a residuary devise which comprehended stock. In *The Bank of England v. Lunn*, Lord *Eldon* expressed a doubt, whether the legislature did not intend that the devisee of stock should take by the devise without the assent of the executor, but ultimately the case was decided on another ground. The statutes, however, seem to warrant the suggestion of his Lordship. By several statutes (c) relating to various public funds, it is provided in nearly the same words, "That all persons possessed of any share in the joint stock of annuities may devise the same by will in writing attested by two or more credible witnesses, but that no payment shall be made on any such devise till so much of the said will as relates to any share, estate, or interest in the said joint stock of annuities be entered in the said office; and that, in de-

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(a) 2 Cas. 175. 2 Br. C. C. 529. S. C.

(b) 3 Br. C. C. 260.

(c) See 5 Ann. c. 19. s. 22.; 1 G. 1. st. 2. c. 19. s. 12.; 5 G. 1. c. 19. s. 26.; 30 G. 2. c. 19. s. 49.

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fault of such transfer or devise, such share, estate, or interest in the said joint stock of annuities shall go to the executors or administrators." It never could have been intended that the executor should, in such case, take the stock for his own benefit; and, therefore, the meaning of the provision must be, that in such case he shall take the legal interest, but not when there is a specific devise.

Alderson in reply. The only inconvenience that the Bank can be put to, is the necessity of enquiring whether the executor has assented to the devise. The same difficulty is imposed upon every individual who has, in his hands, property to which two adverse claims are made. In cases of doubt they may file a bill of interpleader, but until an adverse claim is made, they must be bound to transfer to the party in whom the legal interest is vested. It is admitted that they must do so where the stock forms part of a residuary bequest, and there is no real distinction between a specific bequest and a residuary bequest, *Mead v. Lord Orrery* (a).

Cur. adv. vult.

The following certificate was afterwards sent to the Lord Chancellor: —

This case has been argued before us by counsel, and we are of opinion that, under the circumstances above stated, *Thomas Franklin*, the executor, has a right of action against the Bank for not permitting the transfer by him of the said 16,500*l.* 3 per cent. Consols.

TENTERDEN,
J. BAYLEY,
J. LITTLEDALE,
J. PARKE.

(a) 5 *Alt.* 239.

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The KING *against* TOMLINSON. (a)

UPON an appeal against a rate made for the relief of the poor of the parish of *Stoke-upon-Trent*, in the county of *Stafford*, the justices at sessions amended the rate, subject to the opinion of this Court upon the following case: —

In the above rate, which was made upon a recent survey and valuation of the rateable property in the parish of *Stoke-upon-Trent*, the occupiers of farms, lands, and tithes, and also of market-tolls throughout the said parish, were assessed in respect of such property respectively upon two-thirds of their estimated net yearly rent, payable to the landlord, and the occupiers of houses, potworks, and every other description of building, and also the occupiers of collieries and coal-mines were assessed in respect of such property respectively upon only one half of their estimated net yearly rent or royalty payable to the landlord. In the same rate, the lessees of certain waterworks were assessed in respect of their waterworks and waterpipes within the parish upon only one half of their estimated yearly rental value; but the rate was amended by the Court as to them, by assessing them upon two thirds of such rental value, being in the same proportion as in the case of land.

Where a poor-rate was made upon two thirds of the net rent of lands, and one half the net rents of collieries: Held, that this might be a fair and equal mode of rating; and as the rate did not manifestly appear to be unequal, the Court refused to quash it.

(a) Two or more of the Judges of this court sat, as on former occasions, from Friday the 13th of February to Thursday the 19th of February inclusive; and from Wednesday the 22d of April to Tuesday the 5th of May inclusive. During that period, this and the following cases were determined.

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The question for the consideration of this Court was, Whether, as the occupiers of farms, lands, tithes, market-tolls, and waterworks throughout the said parish are assessed upon two thirds of their estimated net yearly rent payable to the landlord, the occupiers of collieries and coal-mines ought not to be rated in the like proportion upon two thirds of the estimated net yearly mine-rent or royalty paid to the landlord, instead of upon one half as charged in the said rate?

The case was argued in *Hilary* term by *Stutt* and *Godson* in support of the order of sessions. It has long been established as a rule respecting rates for the relief of the poor, that this Court will not enter into the consideration of the inequality of the rate unless it manifestly appears to be unequal, *Rex v. Brograve* (a), *Rex v. Hardy* (b), *Rex v. Sandwich* (c), *Rex v. Aire and Calder Navigation* (d). The sessions may have rated coal-mines in a different proportion from lands, on account of certain deductions which to them appeared reasonable. There is nothing, then, to shew that the rate is unequal, and this Court will not enquire into the fact.]

Alderson and *Whately* contra. If this rate had been imposed merely upon a proportion of the yearly rent, as in the cases cited, the Court might have presumed that the rate was equal; because, after making just and proper deductions, a rate upon half the rent of a coal-mine might be equal to a rate upon two thirds of the rent of lands. But this rate is made upon the net rent. Now, before the sessions could ascertain the net

(a) 4 Burr. 2491.

(b) 2 Crup. 579.

(c) Doug. 562.

(d) 2 T. R. 660.

rent,

rent, all proper deductions must have been made; and the inequality of the rate is, therefore, manifest upon the face of it. Where that is the case, this Court will quash a rate, even if the sessions find that it contains a relative equality, *Rex v. Sellers* (a).

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—
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Cur. ado. vult.

The judgment of the Court was now delivered by

BAYLEY J. The question in this case was, Whether a rate was upon an unequal, and consequently an unjust, principle? It estimated the value of all property according to the net yearly rent; but it fixed the rate according to two thirds of the rent in the case of lands, &c., whilst it fixed it according to one half only in the case of houses and collieries: and whether this made the rate necessarily unequal was the question. It was not disputed but that the sessions were in general the proper judges of value; but it was insisted, that if they fixed the proportions by a wrong rule, this Court might and ought to interfere. And if the proportions have been fixed by a rule which we can pronounce to be wrong, we are of opinion our interference is requisite. Can we, then, pronounce the rule acted upon in this case to be wrong? It was almost admitted, that there might properly be a distinction in the proportions between houses and land, though it was urged there could not be one between land and collieries; but when the consequences of this admission were seen, the admission was withdrawn. We are, however, of opinion, that there may properly be a difference in the proportion of the annual rent, upon which houses and lands are to be

(a) 1 *Nolan*, 239.

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rated: it belonging to the sessions to fix the precise proportion. We also think, that houses and collieries may be classed together.

The rate is to be made on the occupier according to the annual profit or value which the subject of occupation produces; and it makes no difference in the amount of the rate, whether the occupier be tenant or owner. In the case of houses, the annual profit or value is always a *part* only of the annual rent paid to the landlord. Some portion of that rent ought to be set apart to form a fund for repairing, or rebuilding when necessary; in other words, to maintain, or reproduce the subject of occupation: a much less part, if any, of the annual rent of land is wanted for either of those purposes; and the whole in some cases, or nearly the whole in others, is annual profit or value. This difference is mentioned by Lord Mansfield in *Rex v. Brograve*. In the case of collieries, also, a part of the annual rent must be appropriated to repair and replace the works and engines, and in that respect they are in the same situation with houses.

The sessions were, therefore, warranted in making a difference in the proportion of rating, with reference to annual rent, between houses and collieries on the one hand, and land on the other; and it is impossible for us to say that the proportion which they have fixed is not the right one.

It was urged, on the argument that the sessions have fixed the rate according to unequal proportions of the *net* rent; and it was contended, that by the words "*net rent*," was meant the clear annual rent, after every deduction: including, therefore, the part to be set aside for repairs and reproduction of the subject of the rate; and,

and, consequently, that the rate was unequal. But we cannot attribute any such meaning to those terms for the purpose of invalidating the rate. We think they mean only that part of the rent which goes into the pocket of the landlord, and which is the rent paid by the tenant, after deducting taxes and charges of collection: and this construction will support the rate. If the rate had been according to different proportions of the *clear* annual *profit* or *value* of the subject of occupation, it would have been otherwise; but annual rent is not annual profit or value. We are, therefore, of opinion, that the order of sessions should be confirmed.

Order of sessions confirmed.

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Insert. . . Mary to the Mills, 1,

BLADES *against* FREE, Executor of G. W. CLARK.

ASSUMPSIT. The declaration contained several special counts; the first of which stated that *G. W. Clark*, in his lifetime, was resident or dwelling with one *Mary* as his wife, and divers his children and servants, and was about to depart this realm and go to certain parts beyond the seas, to wit, to the *East Indies*; and thereupon, in consideration that the plaintiff would, after the said intended departure of him, *Clark*, furnish and supply to the order of the said *Mary* such goods for the use of her the said *Mary*, and the said children and servants, as the said *Mary* should reasonably require, he *Clark* promised that he, his executors or administrators, would pay for them. Averment, that plaintiff did supply

Where a man, who had for some years cohabited with a woman that passed for his wife, went abroad, leaving her and her family at his residence in this country, and died abroad: Held, that the woman might have the same authority to bind him by her contracts for necessities, as if she had been his wife; but that his executor was not bound to

pay for any goods supplied to her after his death, although before information of his death had been received.

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the said *Mary* with certain goods which she reasonably required for the use aforesaid, and which at that time were worth, &c. The second special count stated the contract to be, that plaintiff should supply the said *Mary* with such goods as she should reasonably require, until reasonable and lawful notice to discontinue such supply should be given to the plaintiff; and that *Clark*, his executors, or administrators would pay for the goods so supplied. The third special count stated the contract to be, to supply goods until *Clark* should return, or notice to discontinue the supply should be given; or, in the event of his death without returning, until plaintiff should have notice of his death. Counts for goods sold and delivered, &c. Plea, the general issue. At the trial before Lord *Tenterden* C. J., at the *Westminster* sittings, after *Michaelmas* term 1827, a verdict was found for the plaintiff on the special counts, subject to the opinion of this Court on the following case: —

G. W. Clark, deceased, in the declaration in this cause mentioned, of whom the said defendant is executor, during the year 1822, and from that time until the month of *January* 1823, resided upon his own freehold property at *Kinsall Green*, in the county of *Middlesex*, with one *Mary Steers* (who passed under the name of and dwelt with him as, but was not, his wife), and their children and servants. In the month of *January* 1823, *Clark* left *England* for the *East Indies*, leaving the said *Mary Steers* and family on the premises at *Kinsall Green*, who continued to deal with the plaintiff and other tradesmen, and they continued to reside there until the end of the month of *August* 1825.

During the residence of *Clark* at *Kinsall Green*, and up to the time of his departure from *England*, that is to

say,

say, from the month of *November* 1822, he dealt with the plaintiff and other tradesmen in that neighbourhood for articles in the way of his and their trade, for the supply, upon credit, of himself and family aforesaid; the orders for the same being given by *Mary Steers*, and the same being paid for by *Clark* at certain periods from and after the delivery thereof. The plaintiff continued to supply goods in the way of his trade to the order of *Mary Steers*, for the use of herself and the family aforesaid, from the month of *January* 1823 until the end of *August* 1825; whereof the goods, for the value of which 20*l.* 3*s.* 10½*d.*, this action was brought, were part, and were supplied as aforesaid between the month of *October* 1824, and the month of *May* 1825 inclusive.

Clark died in the *East Indies* on the 31st of *December* 1824, without having returned to this country since his departure before mentioned. The defendant tendered to the plaintiff the sum of 7*l.*, part of the sum of 20*l.* 3*s.* 10½*d.*, the sum of 7*l.* being the value of so much of the goods as were supplied up to and including the 31st *December* 1824, and the same was received by the plaintiff before the commencement of this action. In or about the month of *August* 1825, and not before, intelligence of the death of *Clark* reached *England*, and was communicated to the plaintiff and other tradesmen and persons residing at *Kinsall Green*.

Kelly for the plaintiff. The question is, Whether *Clark* may not be taken to have agreed, before he left *England*, to pay for such goods as were furnished before notice of his death was received. [*Bayley* J. Suppose the woman had been his wife, could the executor have been compelled to pay?] This case is stronger in favour
of

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of the plaintiff, for had she been the wife of the deceased, in all probability she would have been provided for, and able to pay for the goods furnished after her husband's death. [*Parke J.* Suppose, after *Clark's* departure, she had cohabited with another man, would *Clark* have been liable?] No, her misconduct would have been an answer. [*Parke J.* Then you cannot infer a contract to pay until notice of *Clark's* death, but until notice of that, or the misconduct of the woman, and the declaration is not framed upon such a supposed contract.] The contract is the same, but the law in such case dispenses with the performance, and such dispensations need not be set out in the declaration. The real question is, Whether the contract was revoked by the death of *Clark*? Now, although an authority may be revoked by death, a contract cannot. In *M'Donnell v. M'Donnell (a)*, it was held that bankruptcy did not make void the acts done under a power of attorney previously given by the bankrupts; and in that case, the Vice-Chancellor cited a case tried before Lord *Kenyon*, where a power of attorney had been sent out to *India*, and certain acts were done under it there, after the death of the principal, but before notice of it, and Lord *Kenyon* supported those acts.

Chitty, contra, was stopped by the Court.

BAYLEY J. There is no doubt that a man may make an express contract for goods to be supplied to his wife or mistress after his death, for which his estate would be liable. But here there was no express contract. What

(a) *Buck. 399.*

then

then is the inference of law? that the woman had the same authority to bind the deceased by her contracts, as if she had been his wife, and such an authority would be revoked by his death. It is said, that this is hard upon the tradesman. But he trusts, at his peril, whether the credit is given upon the order of a married woman or a mistress. If he is unwilling to run the risk, he should require an express contract, if he does not do so, and sustains a loss, that is by reason of his own carelessness. It seems to me, that the woman in this case had the authority of a wife, and that she could not make any contract to bind the estate after the death of the testator. The defendant is therefore entitled to have a nonsuit entered.

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LITLEDALE J. In this case there was no express contract, and none can be implied from which the plaintiff can derive a right to recover. There was no continuing implied contract made by the deceased, but an authority to the woman with whom he cohabited to make contracts for him from time to time, and at his death that authority ceased. The tradesman cannot be better off than if this had been a question upon the contract of a wife, and her contracts cannot bind the husband's estate if made after his death.

PARKE J. It is clear that the plaintiff cannot be entitled to recover, unless he makes out a contract between himself and the testator. No contract was proved. All that can be said is, that he gave the woman an implied authority to bind him as a wife might have done. Such an authority may have been given; but in the absence of any contract with the testator, the executor cannot be bound.

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bound. If a contract were to be presumed, it could only be a contract for necessities, which is not the contract described in the declaration.

Postea to the defendant

CLEMENT *against* CHIVIS.

(In Error.)

It is libellous and actionable to publish of a man that he has been guilty of gross misconduct, and insulted females in a barefaced manner.

LIBEL. The first count of the declaration stated, that the plaintiff below (*Chivis*), before and at the time of the committing of the grievances, &c. was the proprietor of a certain stage-coach, wherein he was used and accustomed to carry and convey passengers for hire, profit, and reward to him in that behalf; and that in so doing, he had always properly conducted himself, &c., but that defendant well knowing the premises, and intending, &c., on, &c., at, &c., falsely, wickedly, and maliciously did compose and publish, and cause and procure to be published of and concerning the plaintiff, and of and concerning him as such proprietor as aforesaid, a false, scandalous, malicious, and defamatory libel containing therein, &c. of and concerning the said plaintiff, and of and concerning him as such proprietor as aforesaid; that is to say, "*Greenwich* coachmen. The insolence of some of the *Greenwich* coachmen and their cads becomes intolerable. Our notice has been called to the gross misconduct of *Thomas Chivis* (the plaintiff) and his cad, on coach No. 7600, who, on *Tuesday* last, insulted two females and some gentlemen, who were outside passengers, in the most barefaced manner," &c.

The

The second count omitted the statement of plaintiff's being the proprietor of a coach, and alleged the libel to be "of and concerning the plaintiff" only, and then set it out as before. It was averred as special damage, that by reason of the libel one *John Davies*, who would otherwise have gone by and been carried and conveyed by the plaintiff in his coach for hire and reward to the plaintiff in that behalf, had thence hitherto wholly neglected and refused so to do. Plea, the general issue. The jury found for the plaintiff, damages 5*l.*; and as to the matters alleged for special damage, they found that one *John Davies* in the declaration mentioned, who would have gone by and been carried and conveyed by the plaintiff in his said coach for hire and reward to him, the plaintiff, in that behalf, hath not thence hitherto wholly neglected and refused so to do. A general judgment for the plaintiff below was entered up, whereupon a writ of error was brought, and the case was now argued by

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Plett for the plaintiff in error; who contended, that the supposed libel was not actionable if taken by itself, and without reference to the plaintiff's business, and without proof of some special damage. That the second count did not mention the plaintiff's occupation, and the jury had negatived the special damage; consequently, the judgment being general, was erroneous. The alleged libel was merely a charge that the plaintiff insulted somebody. The meaning of the word insulted is very indefinite: it imputes nothing actionable or indictable. [*Parke J.* It states that the plaintiff was guilty of gross misconduct.] That is afterwards explained

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explained by the statement that he had insulted some passengers.

Chitty contra, contended, that in order to make written slander actionable, it need not impute indictable matter; it is sufficient if it tends to bring the party into odium or contempt. *Bac. Abr., Libel A 2.*

Cur. adv. vult.

On a subsequent day the judgment of the Court was delivered by

BAYLEY J. This was a writ of error from the Court of Common Pleas, and the error assigned was, that a general judgment had been entered for the plaintiff; whereas, the second count of the declaration did not set forth any sufficient cause of action. The introduction to that count stated only that the libellous matter was published "of and concerning the plaintiff," without reference to his occupation. But it imputed to him gross misconduct, and that he had insulted two females in a barefaced manner. It was insisted that this did not constitute a libel, and that was the question reserved for consideration. There is a marked distinction in the books between oral and written slander. The latter is premeditated, and shews design; it is more permanent, and calculated to do a much greater injury than slander merely spoken. There is an early case upon the subject, in which this distinction was adverted to, *King v. Lake (a)*, where the libel charged the plaintiff with having presented a petition to the House of Commons, "stuffed with illegal assertions, ineptitudes, im-

(a) *Hardr.* 470.

perfections;

perfections; clogged with gross ignorances, absurdities, and solecisms." A special verdict was found; and upon argument, *Hale* C. B. held, that "although such general words spoken once without writing or publishing them would not be actionable, yet, here they being writ and published, which contains more malice, they are actionable." This appears to have been a cross action, arising out of some dispute, as *Lake v. King* (a); but in the latter case it was held, that the action could not be maintained, on the ground that the alleged publication was a privileged communication. In a subsequent case *Cropp v. Tilney* (b); *Holt* C. J. says, "Scandalous matter is not necessary to make a libel; it is enough if the defendant induces an ill opinion to be had of the plaintiff, or to make him contemptible and ridiculous." In *Hank. P. C. ch. 73. s. 1.*, it is said, with reference to the criminal law, "It seemeth that a libel, in a strict sense, is taken for a malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and to expose him to public hatred, contempt, or ridicule." The distinction between written and oral slander has also been recognized in *Villers v. Monsley* (c), *Bell v. Stone* (d), *Thorley v. Lord Kerry* (e), and *Robertson v. McDougall* (f). Having then ascertained the rule, it is only necessary to enquire whether the publication in question does hold up the plaintiff to public hatred, contempt, or ridicule. It states that he was guilty of gross misconduct, and then describes in what that misconduct consisted; viz. in in-

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(a) 1 *Bourd.* 120. 131. 1 *Sid.* 414. (b) 3 *Salk.* 225. *Holt*, 426.(c) 2 *Wils.* 403.(d) 1 *B. & P.* 351.(e) 4 *Town.* 355.(f) 4 *Bing.* 670.

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sulting two females, and some gentlemen in the most barefaced manner. That was a very serious and contumacious imputation, clearly calculated to bring the plaintiff into contempt by some persons, and hatred by others; and, therefore, according to the rule established by the cases referred to, we think that the publication was libellous, and sufficient to maintain the action. The judgment of the Court below must, therefore, be affirmed.

Judgment affirmed.

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By the 6 G. 4. c. 57., which repealed the 59 G. 3. c. 50., it is enacted, that no person shall acquire a settlement by reason of settling upon any tenement, unless it shall consist of a separate and distinct dwelling-house, or of land, or of both, *bonâ fide* rented by such person, at the sum of 10*l.* a year at the least, for the term of one whole year, nor unless such house or building, or land, shall be occupied under such yearly hiring: Held, by *Littledale* and *Parke* J., *Bayley* J. dissentiente, that under this statute, a pauper who rented a dwelling-house at the yearly value of 10*l.* and resided in it, but underlet part, thereby gained a settlement.

UPON an appeal against an order of two justices, whereby *Martha Jerrard*, the wife of *Thomas Jerrard*, then in *St. Thomas's* hospital in the borough of *Southwark*, in the county of *Surrey*, and their children, were removed from the parish of *Ditchheat*, in the county of *Somerset*, to the parish of *Lyncombe* and *Widcombe*, in the same county, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The pauper's husband rented a tenement in *Lyncombe* and *Widcombe* by the year, viz. from *Lady-day* 1825 until *Lady-day* 1826, at the yearly rent of 15*l.*, with liberty to quit at any time on giving a quarter's notice. After the first month's occupation, the pauper's husband left the pauper living in the tenement and went to *London*, and remained there about seven months, during which period she remained in the tenement,

and

and until she quitted it as after mentioned; and she paid the year's rent, the receipts for which were given as if it had been received from her husband. A few days after the 25th of *March* 1825, the pauper's husband let an apartment in such tenement to one *Gay*, at the yearly rent of 8*l.*, payable quarterly, with liberty to quit at any time on giving a quarter's notice; and the same was occupied by *Gay* from the time of his taking until the 25th of *March* 1826, and his rent paid to that time. The pauper's husband gave notice at *Christmas* 1825, to quit at *Lady Day* 1826. The landlord permitted the pauper to occupy part of the tenement until *Midsummer* 1826, on paying him 38*s.* for the same; and the pauper quitted at *Midsummer* 1826: the pauper's husband never paid any parochial rates although rated.

Moody, in support of the order of sessions. There was no residence in the parish by the husband for forty days. It is not sufficient that his wife and family have resided forty days, *Rex v. St. George, Southwark (a)*, *Rex v. South Lynn (b)*. Then as to the two periods, the statute 59 G. 3. c. 50. was repealed by the statute 6 G. 4. c. 57., which passed on the 22d of *June* 1825. The settlement of the pauper was not then completed. In order to gain a settlement at all, the whole period must be under the one statute or the other. The words of the latter statute are all prospective, consequently the period which was begun under the repealed statute cannot be added to the part under the latter. This rule of construction was adopted on the passing of the first statute, and ought to be applied to this, *Rex v. St. Mary-le-bone (c)*.

(a) 1 T. R. 466.

(b) 5 T. R. 664.

(c) 4 B. & A. 684.

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If the legislature had intended to introduce a different principle in this case, the words used would not have been all future and prospective. If the two periods can be connected, all the conditions required by the 6 G. 4. c. 57., which passed on the 22d of June 1825, must be shewn to have existed from that time. That is not so in this case, because the house was not occupied by the party hiring the same. The statute 6 G. 4. c. 57. repealed the statute 59 G. 3. c. 50.; and it is a principle of construction, that the same rules be applied to statutes made in *pari materia*, *Rex v. North Collingham* (a). Under the 59 G. 3. c. 50. it was necessary that the house should be held, and the land occupied, by the person hiring the same, for the term of one whole year at least. Under the 6 G. 4. c. 57. that distinction is abolished; and the words are, "that the house, or building, or land, shall be occupied under such yearly hiring, and the rent for the same actually paid for the term of one whole year at the least." Now, the term "occupied" in this latter statute must have the same meaning as was given to it by the decisions on the 59 G. 3. c. 50.; and it was held in several cases, that the term "occupied" in that statute was not satisfied unless the party had the exclusive occupation of the premises. If part was let out in lodgings no settlement could be gained, *Rex v. North Collingham* (b). In that case *Abbott C. J.* says, "As to the second question, it is to be observed, that a different expression is applied to land and to houses. The house is to be *held*, but the land is to be *occupied*: it was probably intended that a party taking lodgers, properly so called, should not be thereby prevented from

(a) 1 B. & C. 584.

(b) 1 B. & C. 578.

gaining

gaining a settlement." The same principle was adopted in *Rex v. Tonbridge* (a). There *Bayley* J. says, "It is not in terms found that there was a joint occupation; but as *Maynard* was to participate in the occupation, we think it must be taken that he did, and if so, the pauper cannot be considered as occupying more than a moiety of the garden." *Rex v. Great Bolton* (b) is to the same effect. [*Parke* J. There is this difference in the two statutes; in the former, the occupation must be by the party hiring the same. In the 6 G. 4. c. 57. the words "by the party hiring the same" are omitted.] That is so; but the legislature must have intended those words to be supplied, otherwise the conditions requisite for a settlement might be performed by other persons than the party acquiring the settlement; and this absurdity would follow, that a party might take the premises for a year, and immediately assign them, and himself be absent, and altogether unconnected with premises for the rest of the year, and yet acquire a settlement. Unless these words are understood as part of this statute, the law as to this species of settlement will be thrown back into all the confusion and uncertainty that existed before the passing of the statutes 59 G. 3. c. 50. and 6 G. 4. c. 57., and which the legislature intended to get rid of. Supposing, therefore, the periods to be connected, still, as the pauper did not exclusively occupy the whole, no settlement could be gained.

Jeremy and Rogers contra. The intention of the legislature must be collected from the act of parliament. It may be fit to consider what the state of the law was

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(a) 6 B. & C. 88.

(b) 8 B. & C. 771.

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before the 6 G. 4. c. 57., and what alteration was introduced by that statute, particularly with respect to occupation. By the 13 & 14 Car. 2. the term for which the tenement was taken, for which it was occupied (after forty days), or by whom it was actually occupied, was immaterial. The 59 G. 3. c. 50. required that the tenement should be taken for a year, and if it consisted of a house, that it should be held; if of land, that it should be occupied for that period *by the person hiring the same*. These words in the last part of the sentence apply to every separate branch; but the house need not have been occupied under the original hiring; for the occupation of the same tenement under the different hirings might be connected, *Rex v. Stow* (a), or different tenements might be taken at different times, *Rex v. North Collingham* (b). But the 6 G. 4. c. 57. requires that the occupation should be under the yearly hiring, but not by the person hiring the same. One restriction is substituted for the other. When the 6 G. 4. c. 57. passed the 59 G. 3. c. 50. must be taken as if it never existed, the *Bishop's case* (c), *Tattle v. Grimwood* (d). Supposing it never to have existed, the 6 G. 4. c. 59. only requires that the pauper shall rent for a year, and that the premises shall be occupied under the yearly hiring. It is immaterial by whom the occupation is, if the relation of landlord and tenant enure for the whole year as originally created. But assuming that the statute requires that the tenement shall be occupied by the person hiring the same, there has been in this case a sufficient occupation; for the occupation of an under-

(a) 4 B. & C. 87.

(c) 12 Coke, 7.

(b) 1 B. & C. 578.

(d) 3 Bingham, 496.

tenant

tenant must in general be considered, with respect to the lessor, as the possession of his lessee, *Rex v. Aberystwith* (a). *Gay* was only an inmate; and as to an inmate who goeth in by the same door, he is in the nature of a lodger, and if his chamber be robbed it is burglary; but the indictment must lay it to be the dwelling-house of him who let it, and not of the inmate.

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BAYLEY J. The statute 59 G. 3. c. 50. is repealed by the statute 6 G. 4. c. 57. The question, therefore, in this case is, Whether a settlement was or was not obtained under the last-mentioned statute? By the 59 G. 3. c. 50. a settlement could not be obtained in the case of a house or building unless such house or building were held, or, in the case of land, unless it were occupied, and the rent for the same were actually paid, for the term of one whole year at the least *by the person hiring the same*. There was, therefore, a specific enactment that the house should be *held*, and the land *occupied*, and the rent paid, *by the person hiring the same*. The language of the 6 G. 4. c. 57. is different. That statute is wholly silent as to the occupation or payment of rent by the person hiring; and it has been decided in *Rex v. Kidworth Harcourt* (b) that, according to the true construction of the statute, the payment of rent need not be made by the party hiring. The words *by the person hiring the same* are to be considered, therefore, as struck out of the statute 6 G. 4. c. 57., and the law altered so far as it required that the rent should be paid by the person hiring the premises. It is now sufficient if it be paid either by the person hiring or by any other person. The

(a) 10 East, 354.

(b) 7 B. & C. 790.

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words of the 6 G. 4. c. 57. s. 2. are, that the house, or building, or land, shall be occupied *under such yearly hiring*, and the rent for the same, to the amount of 10*l.*, shall be actually paid for the term of one whole year at the least. Here the phrase is varied. The statute says, not that the house or land shall be occupied *by the person hiring the same*, but only that it shall be occupied *under such yearly hiring*. And although it may be difficult to arrive with certainty at the meaning of the legislature, which is not expressed in very intelligible language, I incline to think the true construction of those words is, that it shall be occupied by the person to whom that hiring gives the right of occupation, and that occupation by any other person to whom that right is communicated, either by assigning or underletting, is not an occupation under the yearly hiring within the meaning of the statute. That is my present opinion. If between this time and to-morrow morning I should change that opinion, I will certainly communicate it to the Court. My learned brothers think that the words *under such yearly hiring* do not make occupation by the person hiring requisite, but that it is sufficient if either he himself or any other person under him occupy. I think that a party who occupies as an under-tenant, though he may be said in some sense to occupy under the yearly hiring, cannot be said to occupy under the yearly hiring within the meaning of this clause of the act of parliament; because though he does occupy in part under that yearly hiring, he does not in toto; he occupies under the yearly hiring and something else.

As to the other question, viz. whether the holding before the 22d of *June*, when the 6 G. 4. c. 57. was passed, and the holding subsequent to that period, can be connected,

nected, I am of opinion they may, provided the occupation before the 22d of *June* be such as will satisfy the requisites of the 6 G. 4. c. 57.; and, therefore, if a party before the 6 G. 4. c. 57., began to operate was in possession of a yearly tenement, and held it under such circumstances as that statute says shall be requisite in order to gain a settlement, a settlement will be conferred. There are no words in the 6 G. 4. c. 57. which import that the taking shall be subsequent to the time when that statute came into operation.

With respect to the residence for forty days, I think the case ought to go down to the sessions again, in order that it may be stated more distinctly what the nature of the residence was, or whether the whole forty days' residence required was actually by the husband himself. The cause of the husband's absence, whether it arose from his own free will, or from compulsion, or from other circumstances, may possibly be material. In *Rex v. St. George, Southwark* (a), the husband was incapacitated by law from residing in his own house; for he was in prison during the whole of the time, and had not the power of residing on his own property for forty days.

LITLEDALE J. The principal difficulty in this case arises upon the construction of the word "occupied" in the statute 6 G. 4. c. 57. There is a material difference between a holding and an occupation. A person may hold though he does not occupy. A tenant of a freehold is a person who holds of another: he does not necessarily occupy. In order to occupy, a party

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(a) 7 T. R. 466.

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must be personally resident by himself or his family. In this case it seems to me, that the pauper has been the occupier of the house during the whole period. We have no distinct account how the apartment was let or occupied. In an indictment for housebreaking, it might be laid to be the house of the pauper's husband. So in an action for use and occupation, he might properly be described not merely as holding, but as occupying the house. In the statute 11 G. 2. c. 19. s. 14., which gives the action for use and occupation, where the agreement is not by deed, a distinction is made between the words held and occupied. That section enacts, "that it shall be lawful for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, &c. held or occupied by the defendant, in an action on the case for use and occupation of what was so held or enjoyed." By the statute of the 43d of *Elizabeth*, the rate for the relief of the poor is to be on the occupier. The rate in this case must clearly have been made on the pauper's husband for the whole house, though he underlet part. In *Nolan's Poor Laws*, 176. (a), it is laid down that no lodger, though possessing the principal part of the house, was ever rated; but the owner, how small soever the part reserved for himself, is in the eye of the law the tenant for the whole, and is rated as the occupier. Then, as in an indictment for housebreaking (committed in the apartment let to *Gay*), the house might be described as the dwelling-house of the pauper's husband; and as he might be described as the occupier of the house, in an action for use and occupation, and would be rateable to the poor as occupier in respect of the whole house, I

(a) 4th edit.

think

think he must be considered, in point of law, as having occupied and resided in this house. It is not necessary, in order to make a man an occupier, that he should actually sleep or take his meals in a house, or that his family should actually dwell in the whole house; but the law considers him, for this purpose, an occupier if he hold the whole, and by himself or his family occupy part. I think, therefore, the pauper's husband may be considered to have occupied the house within the meaning of the 6 G. 4. c. 57. It might have been otherwise if he had underlet the whole house, and occupied no part. The word occupation, as applied to a house, undoubtedly implies personal residence. But if a lessee of a house dwell in any part of it, though he let the other part, he, in point of law, is to be considered as the occupier of the whole. If that be the true construction of the word "occupied," the pauper's husband occupied the house; and then the only question is, Whether there has been forty days' residence by the pauper's husband? and upon that point there is some doubt. That certainly is essential; for the legislature did not intend by the 6 G. 4. c. 57. to alter the law in that respect. Upon the finding in this case, I rather collect that the pauper's husband had abandoned his wife, and gone to pursue his own course of living in some other place. If he had merely gone away for the purpose of business, with the intention of returning, the residence would be there still, though he was temporarily absent. I agree with my Brother Bayley, that the case ought to be sent back to the sessions, in order to have the fact ascertained.

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PARKER J. I have entertained considerable doubt in this case; but I am inclined to think that a settlement

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was gained in the parish of *Lynchcombe* and *Widdicombe*.

The question turns entirely on the 6 G. 4. c. 57. My judgment may have the effect of defeating the intention of the framer of that act. But it is a very safe rule of construction to adhere to the words of an act of parliament in their grammatical and natural sense, unless it appears clearly from the context that they were intended to be used in some other sense. There is a material difference between the statute 6 G. 4. c. 57. and the statute 59 G. 3. c. 50. The last-mentioned statute expressly requires the building to be held, and the land to be occupied, and the rent to be paid, by the person hiring the same. The statute 6 G. 4. c. 57. omits the words "by the person hiring the same." It does not require the payment of rent or occupation *by the person hiring the same*, but occupation *under the yearly hiring*. These words may be satisfied by the continuance of the term and occupation by a sub-tenant or assignee during the continuance of that term. It is not necessary to decide in this case whether occupation by an assignee would be sufficient or not. Here there was an occupation by a person whose character is left doubtful. It does not appear by the case whether it was that of a sub-tenant, having an entire occupation of one part of the building, or that of a lodger. It seems to me there was an occupation by the husband of the pauper under the yearly hiring, provided the premises continued in the occupation of any person entitled under the tenancy created by the yearly hiring. I think we ought to give effect to the words of the act of parliament in their plain, natural sense, unless we see clearly from the context that the intention of the legislature was different; but I find nothing in the context to shew that that which those words

words taken in that sense import was not their intention. I must suppose that the legislature when they repealed the 59 G. 3. c. 50., which expressly required an occupation by the person hiring, had some reason for omitting those words in the 6 G. 4. c. 57. Possibly that omission may have arisen from inattention on the part of the framer of the act, and it may have been intended to require occupation by the person who took the term. But it seems to me that the words used do not expressly require such occupation, and we must not presume the intention of the legislature, but collect it from the words of the act of parliament. Then if the meaning of the legislature be that which the words used naturally import, a settlement has been gained, provided there has been a residence of forty days. As to that the case is ambiguous. I think it ought to be referred again to the sessions for the purpose of having the facts stated one way or the other. If it be found that there was no residence by the husband for forty days, then no settlement will be gained.

Case sent back to the sessions.

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A lessee of a coal-mine, being the occupier, having erected a steam-engine for working the mine, and thereby improved its annual value, is liable to be rated for such improved annual value.

THE defendant appealed against a rate made the 22d day of *February* 1828, for the relief of the poor of the parish of *Stoke-upon-Trent*, whereby he was rated for a colliery, including engines and railway, at 61*l.* 17*s.* 5*d.*, being a rate made upon the sum of 989*l.* 18*s.* The court of quarter sessions confirmed the rate, subject to the opinion of this Court on the following case: —

The defendant is the lessee and occupier of a colliery in the parish of *Stoke-upon-Trent*. In the year ending on the 31st *December* last he paid to his landlord for royalty a mine-rent upon the coals raised from the said colliery, viz. the sum of 802*l.* 8*s.*, which sum is a *fair mine-rent* for a tenant to pay upon the quantity of coals raised in that year. The sum of 802*l.* 8*s.* forms part of the sum of 989*l.* 18*s.*, upon which the defendant is charged. The defendant, some time since, erected several steam and other engines in the colliery, which are used solely in draining the mines and raising the coals to the surface; and he also laid down a railway, which is solely employed in facilitating the carriage of the coals. These form the machinery with which the mines are worked, and without which they could not be worked; and there would be no mine-rent at all unless such machinery were used. The sum of 187*l.* 10*s.*, which is the remainder of 989*l.* 18*s.*, on which the defendant is charged, is a charge over and above the amount of the mine-rent introduced into the assessment in respect of the engines and railway. And it is calculated, that if the colliery were now

to be let by the defendant to a sub-tenant, along with the engines and railways, the total sum of 989*l.* 18*s.* would not be more than a fair rent for such sub-tenant to pay. If the Court should be of opinion, that the defendant ought to be rated for his engines and railways, in addition to what he ought to pay as mine-rent to his landlord, then the rate was to stand; but if not, then the rate was to be reduced to 50*l.* 3*s.*

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McMahon in support of the order of sessions. The defendant, as the occupier of coal-mines which are found to be of the annual value of 989*l.* 18*s.* (if let to a tenant), is rateable in respect of that annual value. In *Rex v. Atwood* (a) it was expressly held, that the lessee of coal-mines was rateable for the amount of royalty or rent which he pays, and that no allowance was to be made for money expended in rendering the mines productive. *Rex v. Bilston* (b) is distinguishable, because the engine there was erected for the purpose of drawing water from an iron-stone mine which itself was not rateable.

Godson contra. The defendant is not the owner, but the lessee of the mine. If the owner had occupied the mine he would undoubtedly have been rateable for the improved annual value; for the value would then have been permanently increased by the engines, &c. But the tenant, who may have only a short term in the coal-mine, and who has expended a large capital in erecting engines, ought not to be rated for the increased annual value produced by the expenditure of his capital. Until that capital is repaid to him, the increased annual value is of no advantage to him. But in fact the lessee is

(a) 6 *B. & C.* 277.(b) 5 *B. & C.* 851.

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already rated for the engines and railway. The rate is made in proportion to the quantity of coal raised. The quantity raised and sold has been increased by the erection of the engines, &c., and the occupier is rated in respect of that increased quantity. He has, therefore, already been rated in respect of the engines and railway.

BAYLEY J. I have no doubt that the defendant ought to be rated for his engines and railway. Whether the sessions have made proper deductions we are not to decide. The only point for our consideration is, Whether the defendant ought to be rated for the engines and railway? If the owner had occupied the mine he would have been liable to be rated according to the improved value of the property; and where the owner of a mine fixes an engine, or otherwise, by expenditure of his capital, raises the value of his property, he will be rateable for the value of that property so improved by his expenditure. If it be leased to a tenant who is to incur the same expenditure of erecting an engine, the owner will receive a less royalty; but as a greater quantity of coal will be raised, the tenant will be thereby remunerated for his expenditure, and I think the tenant, being the occupier, is liable to be rated for such improved value. The order of sessions must, therefore, be confirmed.

LITTLEDALE J. The question is, Whether the defendant be liable to be rated at the increased amount mentioned in the case, by reason of the engines and railway which he has erected? Generally speaking, the rate is to be in proportion to the rent. Here the tenant
has

has erected an engine, which renders the mine more productive. It is immaterial, with reference to rateability, whether the landlord or tenant erect an engine or lay down a railway. The bargain between the landlord and tenant may be varied on that account, but the occupier of the property is rateable in respect of its improved annual value. I think, therefore, that the lessee of this mine being the occupier, was properly rated for the improved value.

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PARKE J. The question left to us is, Whether the defendant be liable to be rated for improvements? I think he clearly is. It is found by the sessions that the value of the property is raised by the improvements from 802*l.* 8*s.* to 989*l.* 18*s.* Whether the amount of the rate is precisely what it ought to be it is not for us to determine. The sessions seem to have estimated the value according to the sum at which it would let to an under-tenant. That, perhaps, may not be the correct principle on which such property ought to be rated. The annual value is part only of the annual rent: some portion of that rent should be considered applicable to repairing and replacing the engines. In *Rex v. Tomlinson* (a) this distinction was taken. The only question for us, however, is, Whether it be right in principle to rate the lessee in respect of an annual value increased by reason of improvements made by himself? I think he was properly rated for the improved value.

Order of sessions confirmed.

(a) *Ante*, p. 163.

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*Cundell. v. Dawson & C.B. 57b.*LITTLE *against* POOLE.

The 47 G. 3. c. 68. recites, that the several acts then in force for regulating the vend and delivery of coals had been found insufficient to prevent the commission of frauds in the vend and delivery of such coals, and that it would tend greatly to facilitate the execution of the purposes intended by the said acts if the same were repealed, and further and better provisions made for those purposes; and then, by section 113. enacts, that the vender of coals, sold and sent as and for wharf-measure, from any ship, &c., or from any wharf, &c., and to be delivered to the purchaser thereof from any cart, &c., shall deliver a printed ticket, and the carman or driver shall deliver the same to the purchaser or his servants before any part of the coals shall be delivered therefrom. It then gives the form of the vender's ticket, which is to contain the number of sacks, the name of the coals sent, &c., the name of the vender, and the name of the labouring meter; and it subjects any vender of coals, who shall not deliver such ticket, to a penalty of 20*l.*: Held, that this act made it imperative on the vender of coals to deliver a vender's ticket signed by the meter, and that the act having been passed to protect the buyer against the frauds of the seller, a vender of coals, who had delivered a vender's ticket to the purchaser, which was not signed by the meter, could not recover the price of the coals from such purchaser.

ASSUMPSIT for goods sold and delivered, and the usual money counts. At the trial before Lord Tenterden C. J., at the London sittings after Easter term 1828, it appeared that the action had been brought to recover the value of a quantity of coals supplied to the defendant, under the following circumstances:— The plaintiff was a dealer in coals by commission; and having received an order from the defendant, directed a coal-merchant named *Witherby* to send in the coals. They were accordingly supplied to the defendant by *Witherby* on account of the plaintiff, who, being unable to obtain payment, commenced an action to recover the amount of the coals so supplied. After the commencement of the action, the defendant paid the debt to the plaintiff's wife, but nothing was done with respect to the costs; and the plaintiff in consequence continued his action for the purpose of recovering them. No evidence of the delivery of the coals was offered at the trial on the part of the plaintiff, but having proved the payment, and that it had been made after the action brought, he claimed to recover nominal damages. Upon which, the defendant called the carman who had been employed by *Witherby* to deliver the coals to the defendant, and

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he identified the vender's and meter's tickets produced to him as those sent with the coals. It appeared that the vender's ticket, which was a printed form, *had not been signed by the meter*, which it was contended was necessary under the 47 G. 3. c. 68. (a) s. 113., nor had his name been inserted in the blank left for it in the form. It further appeared, that in the margin of a book produced from the principal coal-meter's office, from which book the ticket in question had been cut, the coals were described as *Burdon*; in the ticket itself they were represented as *Wallsend*; the former is an inferior description of coals to the latter. The defendant's counsel thereupon contended that the plaintiff had been guilty of a fraud upon the statute, the vender's ticket not having been signed by the meter; and if so, that as no action could have been maintained to recover a demand arising out of it, the mere payment of the demand after action brought could not entitle the plaintiff to recover the costs. Lord *Tenterden* C. J. refused to nonsuit, but directed the jury to find a verdict for the plaintiff, with 1*s.* damages, and gave the defendant's counsel leave to move to set it aside and enter a nonsuit. A rule nisi for that purpose having been obtained.

Channel

(a) The 47 G. 3. c. 68., after reciting "That the several acts then in force for regulating the vend and delivery of coals brought into the port of *London*, within the cities of *London* and *Westminster*, and the liberties thereof, had been found insufficient to prevent the commission of frauds and impositions in the vend and delivery of such coals; and that it would tend greatly to facilitate the execution of the purposes intended by the said acts if the same were repealed, and further and better provisions made for those purposes," by sect. 102. enacts, that the principal land coal-meter shall deliver to every seller of coals sold by wharf-measure, or the carman who shall cart, load, carry, or drive away the same, a ticket signed by one of the principal land coal-meters, and countersigned by the labouring coal-

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Channel now showed cause. The statute enacts that upon the sale of coals, two tickets shall be delivered, a meter's and a vender's ticket. The form and requisites of

meters attending and delivering the same, in which shall be contained the christian and surname of the vender, and also of the purchaser of the said coals, and the *quantity* of such coals, and the day of the week, month, and year of the delivery and admeasurement, and amount of the metage-charge, and the names of the carmen employed to cart, lead, drive, or carry the same coals; and also shall contain a notice to the purchaser, that if he be dissatisfied with the measure thereof, and shall desire to have such coals re-measured, such dissatisfaction must be expressed to the carman before more than one sack of such coals is shot or unladen from the waggon, cart, &c.; which ticket shall be delivered unaltered by the labouring coal-meter, countersigning the same, to the carman or person employed to cart, carry, drive, or lead the coals described in such ticket; which ticket, unaltered, the carman therein named to be employed to cart the coals in such ticket described shall deliver to the respective consumers or purchasers therein named, and if the labouring coal-meter countersigning such ticket shall, after payment of the meetage charge, refuse to deliver such ticket to the carman employed to cart the coals therein described, such labouring coal-meter shall for every such offence forfeit the sum of 10*l.*; and if such carman shall, after the same ticket shall have been delivered to him, either alter, or neglect or refuse to deliver the same ticket to the purchaser or consumer therein named, such carman shall forfeit for every such offence any sum not exceeding 40*s.*

Sect. 113. enacts, that the vender of coals, sold and sent as for wharf-measure, from any ship, vessel, lighter, barge, or other craft, or from any wharf, warehouse, or other place within the port of *London*, &c., and to be delivered to the purchaser thereof from any cart, waggon, or other carriage, shall, and he is required to deliver, or cause to be delivered, a printed ticket or paper, and such carman, driver, or other persons, shall, and is required to deliver, or cause to be delivered, the same ticket so received from such vender to the purchaser of such coals, or to his servant, before any part of the coals contained in such cart, waggon, or other carriage shall be shot or delivered therefrom; and every such ticket shall be in the words and form following:—

“ VENDER'S TICKET.

“ *Mr. A. B.* [*here insert the name of the buyer*].

“ Take notice, that you are to receive herewith [*here insert the number*] sacks of [*here insert the name of the*] coals; and that by an act made in the
forty-

of these tickets vary according to the nature of the sale; whether the coals are sold by pool-measure, wharf-measure, or by weight. The case before the Court is a sale of coals by wharf-measure. The *meter's* ticket upon such a sale and delivery, must be signed by him, and that has been done. The vender's ticket, upon which alone any objection arises, did not necessarily require his signature, and it would have been a sufficient compliance with the statute, if the meter's name had appeared on the ticket, though inserted by the vender himself. The 102d section specifies what the *meter's* ticket in the instance of coals sold by wharf-measure shall contain, viz., the names of the buyer and seller, the quantity of the coals, the day of the month and year of the delivery and admeasurement, the name of the carman, and other particulars; and it expressly requires that such ticket shall be signed by one of the principal land coal-meter's, and countersigned by the labouring coal-meter. The 105th section, too, imposes a penalty of 10*l.*, unless such ticket (that is the meter's ticket,) shall be obtained and delivered so signed and countersigned as aforesaid. The case with regard to the

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forty-seventh year of King *George* the third, the carman is directed to deliver this ticket before he shoots any of the coals out of his cart or waggon; and that a bushel-measure is in such cart or waggon, by which the carman is directed to measure gratis (under the penalty of 20*l.*) the coals contained in any one sack, which the purchaser or his servant may require, which sack is to contain three bushels, heaped up in the form of a cone, the outside of the measure being the extremity of the base thereof; C. D. [here insert the name of the vnder]; E. F. [here insert the name of the labouring meter, in case of the coals being sent from within either of the districts of the said respective officers]. Dated [here insert the day of the month and year when such ticket was signed]."

A penalty of 20*l.* is then imposed by this section upon the vender who neglects to deliver such ticket.

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vender's ticket, is however essentially different. The 113th section regulates the delivery of that ticket, and requires a ticket to be delivered in the form set out in the section; and at the end of the form as given by the act, there is a direction that the names of the vender and meter, and the day of the month and year, shall be inserted; but it is no where said that such ticket shall be signed. It is material also to observe, that in the latter part of the same section, by which a penalty is imposed for not delivering the vender's ticket, the statute again omits the words *signed and countersigned*, which are used in the sections applicable to the meter's ticket; and it is therefore fair to presume, that, if it had intended that the enactments relating to the signature of the meter's ticket should apply also to the vender's, it would have expressed itself in the same or equally intelligible language. If then it would have been a sufficient compliance with the act, if the vender had himself inserted the meter's name in the vender's ticket, the neglect to do so is an omission, but not such a contravention of the policy of the act as will prevent the plaintiff from recovering. But admitting the vender's ticket ought to have been signed by the meter, the plaintiff still is entitled to recover. For any thing that appears to the contrary, the omission to sign the ticket may have rested wholly with the meter, who is a public officer, not the servant of the seller, nor under his control, and for whose default the vender is not in point of law liable. Even if the omission be held to be that of *Witherby*, the plaintiff was ignorant of it, and ought not to suffer; for though it must be admitted *Witherby* was the agent of the plaintiff, and that if the coals sold by *Witherby* had been deficient in quantity or quality, the case would have fallen within

within the rule, that the principal must be responsible for the acts of his agent, and such deficiency being a fraud upon the purchaser, and committed by the agent, must have wholly or partially affected the remedy of the principal; yet here it is not pretended that the coals were deficient in quantity, and there is no evidence on which the Court can say they were a different sort from those described in the ticket. All the cases which have decided that a party shall not be allowed to recover, in respect of a transaction contravening the policy of a statute, are cases where the party himself, in his own person, had set the act of parliament at defiance, and, as far as he could, treated it as a dead letter, as *Law v. Hodgson* (a), *Bensley v. Bignold* (b), relied upon by the other side, or cases in which the party had wilfully and knowingly aided and assisted another in so doing, as *Langton v. Hughes* (c), *Cannon v. Bryce* (d). The objection taken to the plaintiff's recovery in these several cases was not allowed by the Court out of favour to the defendant, but with a view to discourage parties from entering into illegal contracts or neglecting statutory enactments, by refusing to listen to parties who have so acted, but the Courts have never yet withheld their protection and assistance from a party who is innocent. Here the plaintiff is so; he has neither infringed the law himself, nor assisted another in doing so. The omission was the default either of the meter or of *Witherby*, and the defendant has had the benefit of the commodity he contracted for, and ought, therefore, in justice, to pay. There is also this distinction between

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(a) 11 *East*, 300.(b) 5 *B. & A.* 336.(c) 1 *M. & S.* 593.(d) 3 *B. & A.* 179.

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the present and all the cases yet decided,—that in no one of these cases could any additional evidence have been required to have supported a conviction for the penalty, if the question had been raised in the shape of an information, than was adduced in support of the objection taken at nisi prius to the plaintiff's recovery. But the Court cannot in the present case say, upon the evidence on which this objection rests, that the plaintiff, by reason of the neglect of *Witherby*, could be subjected to the penalty.

F. Pollock in support of the rule. There may be weight in the argument, that if the vender's ticket need not be signed by the meter, the mere neglect to insert his name will not prevent the plaintiff from recovering; but the insertion of his name would not have been sufficient, for whatsoever may be the difference in point of language between the section applicable to the meter's and that applicable to the vender's ticket, it is clear, from the whole tenor of the act, and particularly from the ninety-third section, which imposes a penalty upon a meter signing a vender's ticket without being satisfied that the coals sent are of the quality described in such ticket, that the legislature intended the vender's ticket should be signed by the meter. The object of the statute, as appears by the preamble, was to guard against the commission of fraud in the sale of coals. Now, the meter's ticket, it is true, expresses the quantity of the coals sent, but is wholly silent as to the quality of them. The vender's ticket, on the other hand, if in conformity with the act, must describe the quality as well as the quantity of the coals; and if it shall be held a sufficient compliance with the act, that the meter's ticket has been signed,

signed, the public will be left without any security whatever that the quality of the coals delivered corresponds with the quality charged for, and, consequently, one great object contemplated by the act will be defeated. If, then, the vender's ticket ought to have been signed by the meter, *Law v. Hodgson* (a) and *Bensley v. Bignold* (b) are precisely in point. With regard to the objection taken on the other side, that the plaintiff ought not to suffer for the omission of *Witherby*, it is a sufficient answer to say, that if the plaintiff, instead of supplying the coals himself, chooses to do so through the agency of *Witherby*, whatever will be a good defence to an action at the suit of *Witherby*, will be equally so to a demand by the plaintiff. It is true, that there is no actual evidence that the coals sent were of a different description from those described in the ticket. The case, nevertheless, warrants strong suspicions that such was the case; for it appeared, that on the production from the coal-meter's office of the book from which the vender's ticket was proved to have been cut, there was written *Burdon* in the margin; whilst the coals sent were represented by the vender's ticket to be *Wallsend*. This circumstance, in all probability, induced the meter to withhold his signature, who, had he signed the ticket, would have subjected himself to a penalty; for it was not disputed at the trial that *Burdon* coals were of an inferior description of coals to *Wallsend*.

Lord TENTERDEN C.J. The rule for entering a nonsuit must be made absolute. The regulations introduced by this act of parliament appear by the recital

(a) 11 *East*, 300.

(b) 5 *B. & A.* 335.

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to have been intended to prevent the committing of fraud in the vend and delivery of coals. The act requires two things to be done: first, by s. 102., that there shall be a meter's ticket, signed by one of the principal land-meters, and countersigned by the labouring meter, which shall specify, among other things, the quantity of coals; and this ticket is to be delivered to the person employed to cart the coals, and by him to the purchaser. The latter is thereby enabled to have the coals measured, and to protect himself against any fraud of the seller as to the quantity. By that section the vender is required to describe the *quantity* but not the *quality* of the coals. But by s. 113., the vender of coals by wharf-measure is required also to deliver a ticket to the carman employed to cart the coals, and the latter is to deliver it to the purchaser of such coals, or to his servant, before any part of the coals shall be shot from the waggon. The form of this ticket is then given, and it thereby appears that it is to contain (among other things) the number of sacks and the *name* of the coals, and the name of the vender is to be affixed to it as well as the *name of the labouring meter*; and the vender, in case he does not cause to be delivered such ticket, is subjected to a penalty of 20%. It is true, that this section does not in express terms require that the vender's ticket shall be *signed* by the labouring coal-meter, but merely that his name shall be inserted. But when I consider the object which the legislature had in view, viz. to prevent all frauds on the part of the seller, and that such fraud may be committed by delivering coals defective in quality or in quantity, I think it perfectly clear that it must have been intended by this section that that ticket should be signed by the labouring coal-meter;

meter; for otherwise the buyer will have no protection against the fraud of the seller in delivering coals of a quality different from that which they are described to be. Here the meter did not sign the ticket, and this provision having been intended to protect the buyer against the fraud of the seller, I think, on the authority of the cases cited, that the plaintiff, who was the seller of the coals, in this case, is not entitled to recover.

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BAYLEY J. This case falls within the principle upon which *Law v. Hodgson* (a) was decided. The statute 17 G. 3. c. 42. recited that inconveniences had arisen to the public, by frauds committed in lessening the size of bricks under their usual proportion, without any diminution of price; and required bricks for sale to be of certain dimensions, and gave a penalty for the breach of that regulation. The plaintiff having sold and delivered to the defendant bricks which were under the statutable size, brought an action to recover the value of them. It was contended, that, as the defendant had accepted and converted the bricks to his own use, the vendee was liable to pay the value, particularly as the statute had not avoided the contract, but had only subjected the brickmaker to a penalty. But the Court held, that the policy of the act being to protect the buyer against the fraud of the seller, would be best effected by holding, that the vender should not recover the value of the bricks sold under such circumstances. That applies to the present case. The buyer, who sees the ticket of the vender, in which the coals are described as *Wallsend* coals, is induced to believe they are

(a) 11 *East*, 300.

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of that quality; but the meter, if he discharged his duty, would not have signed that ticket unless the coals corresponded in quality with the description given in the ticket. The signature of the meter, therefore, is a security to the buyer that the coals are of the quality described; and the provision which requires such signature, was evidently introduced in order to protect the buyer against the fraud of the seller. The object of the legislature will be best effected, therefore, by holding that the seller shall not recover the value of his coals where he does not cause to be delivered to the purchaser a ticket signed by the meter, pursuant to the provisions of the act of parliament. The ticket not having been so signed in this case, I think that the plaintiff is not entitled to recover. It is quite clear that for the purposes of this case, *Little* and *Witherby* must be considered as the same person.

LITLEDALE J. The object of the act of parliament was, that the assertion of the vender, as to the quantity and quality of the coals, should not be trusted. The quantity of the coals is required to be specified in the meter's ticket, which must be signed by a principal land coal-meter, and countersigned by a labouring meter. But the *quality* of the coals is not required to be specified in that ticket. Generally speaking, a purchaser does not know *Wallsend* coals from any other. For the protection of the buyer, therefore, the 119th section of act requires that the meter shall certify that the coals are of the quality which they are stated to be in the vender's ticket. That is a provision introduced to protect the buyer against the fraud of the seller. On the authority of the cases cited, I think that the plaintiff is not entitled to recover.

PARKE

PARKE J. The provision which requires that the meter shall be a party to the vender's ticket, which is to contain a description of the quality of the coals, is a regulation intended to protect the purchaser; and that being so, according to *Law v. Hodgson (a)*, the plaintiff cannot recover. The rule for entering a nonsuit must, therefore, must be made absolute.

Rule absolute.

(a) 11 *East*, 300.

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The KING *against* ANN GREEN and Others.

UPON an appeal by the defendants, widows, inhabitants and occupiers of certain houses and premises in the parish of *Lee*, in the county of *Kent*, against a rate or assessment made for the relief of the poor of that parish, dated the 2d of *April* 1828, the sessions confirmed the rate, subject to the opinion of this Court on the following case: —

The master and wardens of the merchant tailors of the fraternity of *St. John the Baptist*, in the city of *London*, are and have long been patrons of a charitable establishment for the relief of the widows of poor free-men of the company of merchant tailors. About three years ago the company purchased land in the parish of *Lee*, whereon they erected thirty alms-houses for the reception of such poor widows. The appellants are poor women, and are resident in the alms-houses as alms-women and objects of the charitable establishment, and pay no rent for the same, and are also removable at the pleasure of the master, wardens, and court of assistants of the company of merchant tailors. The land upon which the alms-houses are built, comprising about

The objects of a charity in the actual occupation of alms-houses, paying no rent for the same, and removable at the pleasure of the patrons of the charity, are rateable to the relief of the poor in respect of such occupation.

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about two acres, is the freehold property of the merchant tailors' company; and the same was purchased, and the alms-houses erected and built thereon, at the sole expence of the company, out of their corporate fund. Before the purchase of the land as aforesaid, the same was rated on the occupier thereof at the rate of 2*l.* 5*s.* per annum, and the parochial rates were regularly paid in respect thereof upon such rating. The question for the opinion of this Court was, Whether the defendants were liable to be rated for the relief of the poor of the said parish?

Bolland (and *Clarkson* was with him), in support of the order of sessions, was stopped by the Court.

D. Pollock and *C. Law* contra. By the 43 *Eliz. c. 2.* s. 1. the churchwardens and overseers are authorized to raise weekly (by taxation of every inhabitant and occupier of lands, houses, &c., in the said parish, in such sums of money as they shall think fit) a convenient stock of flax, hemp, &c., to set the poor on work; and also competent sums of money for the relief of the lame, impotent, old, blind, and such other among them, being poor and not able to work, &c., according to the ability of the same parish. The assessment, therefore, is to be made upon the inhabitants and other occupiers of lands and houses, "according to the ability of the parish." Now the latter words controul the general words of the clause. The poor-rate is a personal tax in respect of land or houses (not a tax on them), and in respect of ability by reason of such land or houses, *Theed v. Starkey* (a). Lands or houses may confer ability or be evidence of it. They may, and generally do, yield

(a) 8 *Mod.* 314.

profit; but in order to make parties rateable, there must be a beneficial occupation, or, in other words, they must be occupiers having ability. But if the lands or houses yield no profit the occupation of them is no evidence of ability; and if the parties to be assessed possess no ability aliunde, they are not rateable. Parties to be rateable must be proper persons to be personally taxed in respect of their lands or houses. The defendants, who are the objects of this charity, are not proper persons to be taxed in respect of the houses which they inhabit. In *Rex v. St. Luke's Hospital* (a) it was held that neither the trustees nor the servants necessary to the establishment, nor the lunatics resident in the hospital, were rateable to the poor. Lord Mansfield there says, "It would be too gross to conceive them (that is, the objects of the charity) to be proper persons to be rated to the relief of the poor." In *Ayre v. Smallpeace* (b) it was decided that the comptroller of Chelsea College, resident in the college, was rateable for apartments which he had distinctly and separately for his own use. There the property was held to be rateable, and the occupier a proper person to be rated by reason of his ability. The value of the property occupied was the measure of the rate. In *Rex v. Waldo* (c) it was held that the person who dedicated an alms-house to charitable purposes, and made no profit of it, was not rateable. There no attempt was made to rate the objects of the charity. In *Rex v. Munday* (d), indeed, it was decided that the objects of a charitable foundation, in the actual occupation of the alms-house and lands, for their own benefit, in the manner prescribed by the rules of the

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(a) 2 Burr. 1053.

(b) 1 Bott, 131.

(c) Cald. 358.

(d) 1 East, 584.

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institution, and liable to be dismissed for any breach of such rules, were rateable in respect of such occupation. But in that case profit was made of the land and of the produce; for the poor persons ploughed, sowed, and reaped. They had, therefore, a beneficial occupation; there was some ability in the occupiers. Besides, they were possessed of a life interest, determinable only on certain contingencies. It will be consistent with all the cases to hold that all occupiers of houses are *prima facie* rateable, but that such rateability shall be confined to such occupiers within the parish as have ability to pay in respect of such houses or otherwise, but that they shall not be considered rateable occupiers within the parish when they do not possess ability, nor any property yielding profit.

BAYLEY J. I have no difficulty in coming to the conclusion that this property is rateable. The statute of the 43 *Eliz. c. 2.* enacts "that the rate shall be imposed upon every occupier of lands, houses, &c." It has been made a question in several cases, whether a person residing in a house used for charitable purposes is liable to contribute to the relief of the poor. In *Rex v. Catt (a)*, it was decided that the master of a free-school appointed by the minister and inhabitants of a parish under a charitable trust, occupying a house and garden belonging to the school, was rateable, although they were held by him as a recompence for teaching, he being a beneficial occupier. Lord *Kenyon* there says, "To the authority of the cases cited I subscribe my assent. They proceeded on the ground that there was no occupier. In *Rex v. Waldo (b)* the rate was held to

(a) 6 T. R. 532.

(b) *Cald.* 558.

be bad because there was no occupier ; the poor children who were placed there for education could not be considered as occupiers, neither could the woman-servant who superintended them. That case could not be distinguished from that of *St. Luke's Hospital*, where the rate was also quashed, because there was no beneficial occupier. But when a case arises where a person is found to be the beneficial occupier of a house, he must be rated, though the house be appropriated to charitable purposes. As long as *Richmond Park* continued in the hands of the king, it was not rateable : but when the ranger made profits of it, and beneficially occupied it, it was held to be rateable in his hands. So if this person had been put in merely to look after the pupils, and had not occupied the house, he would not have been rateable ; but it appears that he is the beneficial occupier of this house and garden. By the old land-tax act, certain property given for charitable purposes is exempted from that tax : but there is no such exemption in the acts respecting the relief of the poor." In *Rex v. Munday (a)*, the objects of a charitable foundation, in the actual occupation of an alms-house, were held to be rateable. That case is not distinguishable from the present in point of principle. There they were rated for the alms-house and lands in the sum of 2*l.* 5*s.*, and the Court held that they were rateable for the *house* and lands ; they must, therefore, have been considered as occupying that *house* rent free. It is true that in this case the objects of the charity are described as poor persons, but there is no distinction in the statute between poor persons and others. If they are occupiers of property from which they derive a benefit, they are rateable. Mr.

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(a) 1 *East*, 584.

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Nolan, in his Treatise on the Poor Laws, p. 188.; after stating the authorities upon this subject, says, "The distinction, therefore, as to where charities are rateable, and where they are not so, seems to depend upon this: whether there is any body who can be rated as *beneficial occupier*." I do not cite this book as an authority, but merely to shew that if the merchant tailors' company, before they appealed against the rate in question, had looked into the authorities collected in that book, they would have found that there was no ground for the appeal.

LITLEDAL and PARKE J. concurred.

Order of sessions confirmed.

DE LA CHAUMETTE *against* The Bank of ENGLAND.

A bank of England note, which had been feloniously stolen in England in February 1826, was remitted, in May 1827, by a foreign merchant to his correspondent in this country, to whom he

TROVER for a bank note. Plea, not guilty. At the trial before Lord *Tenterden* C. J., at the London sittings after *Michaelmas* term, the plaintiff rested his case on the following facts, which were admitted: The plaintiff on the 29th of May 1827, being possessed of a promissory note made by the defendants, dated the 16th of February 1826, No. 4356, for 500*l.*, payable to

was indebted in a sum exceeding the amount of the note. The latter demanded payment; the Bank refused to pay, on the ground that the note had been stolen. At the time when the correspondent was informed of this, he had not made the foreign merchant any advance on the credit of the note: Held, first, that in trover for the note, the correspondent must be considered the agent of the foreign merchant, and that he could therefore recover upon his title only.

Secondly, that in such action, it having been proved that the note had been stolen, it was incumbent on the plaintiff to shew that the foreign merchant had given full value for it.

Quære, Whether the property in a promissory note made in England, and payable to order or bearer, is transferable by indorsement or delivery in a foreign country.

bearer,

bearer, caused the same to be presented for payment at the Bank of *England*, and the defendants detained the same, on the alleged ground that the note had been stolen sometime before from a gentleman named *Haselton*, and refused to deliver the note to the plaintiff, although demanded, or to pay him the amount thereof. On the part of the defendants it was proved, that *Haselton* on or about the 28th *February* 1826, being possessed of the promissory note above mentioned, about twelve o'clock of the night of the same day, the same note was stolen from him. The defendants further proved that the plaintiff had represented that he had received the following letter, which he sent to them as a letter received by him from his principals, *Odier and Co.*, dated *Paris, July 21st, 1827* : — “ We should have liked to trace the sales of the stolen 500*l.* note to their source, but unfortunately our endeavours have not been very successful, and we doubt whether Mr. *Haselton* will be able to discover the thief; we offer him, however, our best services, and will, if he chooses to pay the expenses, take any steps that may appear desirable to him. Our seller is a Mr. *Emerique*, a bullion dealer, who has signed his name on the back of the note; his seller is a Mr. *Duval*, another bullion dealer, residing in the *Passage du Panorama*, who says he bought the note of an *English* gentleman, whose name and address he does not know; the latter adds, that being well acquainted with bank-notes, when he buys them he merely ascertains their genuineness, which, though a vague mode of dealing, is a very current one amongst our bullion men, as the addresses which are given are generally false, and other precaution cannot well be taken. If the loser should wish us to summon

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Mr. Duval before a commissary of the police we will do so; we do not believe it will lead to a beneficial result.” In order to prove that this letter was a translation of a letter from *Odier* and Co., sent by the plaintiff to the defendants, the plaintiff’s clerk was called as a witness by the defendants; he proved that the plaintiff was a merchant in extensive business, and corresponded with the house of *Odier* and Co. at *Paris*, and was in the habit of receiving from them and other houses there large remittances in bills of exchange and bank-notes; that in the course of a year he had received remittances from *Odier* and Co. alone to the amount of 40,000*l.*; that he received the bank-note in question on the 28th day of *May*, being part of a remittance of a sum of 1300*l.*; and that at the time when he so received it *Odier* and Co. owed him a balance of 1700*l.* That balance, however, was reduced to 900*l.* by other remittances before he had notice that the note in question was stopped at the bank. The course of business between the plaintiff and *Odier* and Co. was for *Odier* and Co. to make remittances to the plaintiff from *Paris* to *London*, and for the plaintiff to remit to them from *London* to *Paris*, and so take advantage of the exchange; and they divided between them the profits at the end of the year. Each party was, however, answerable for the paper transmitted to the other. It further appeared that Bank of *England* notes to the amount of 500*l.* were commonly bought and sold at *Paris* by money-changers, and that when a money-changer sold a bill of exchange or a note to a banker or merchant he put his name upon the bill, and warranted the payment of it; and in case of a note, he guaranteed on a separate paper called a *val* that the note was genuine. Upon this evidence it

was

was contended by the defendants' counsel, that although *Odier and Co.* were indebted to the plaintiff at the time when he received the note, yet as he had not given them any further credit on the faith of the note before he had notice that it had been stopped at the bank, he must be considered as having received it as their agent, and that he could recover on their title only; and they cited *Solomons v. The Bank of England* (a); and, secondly, assuming that to be so, it was incumbent on the plaintiff to shew that *Odier and Co.* gave full value for the bill; thirdly, that as promissory-notes were transferable, not by the custom of merchants, but by the 3 & 4 *Anne*, c. 9., which placed them on the same footing as inland bills of exchange, a promissory-note made in this country was not assignable in *France*; that this note must, therefore, be considered a mere chattel; and that being so, and having been feloniously stolen from *Haselton*, the property in it remained in him. Lord *Tenterden* C. J. said that as the last point was one of considerable importance, he would give no opinion upon it, but would reserve liberty to the defendants to move to enter a nonsuit if there should be a verdict for the plaintiff. As to the other point, he was of opinion that for the purposes of this cause, the plaintiff must be considered identified with *Odier and Co.*, and that unless they could recover he could not, and directed the jury to find a verdict for the plaintiff, if upon the evidence they were of opinion that *Odier and Co.* obtained the note in the ordinary course of business. A verdict having been found for the plaintiff, a rule nisi had been obtained for a nonsuit upon the ground that *Odier and Co.* had acquired no

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(a) 13 *East*, 155.

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property in the note by delivery, or for a new trial, on the ground that the plaintiff ought to have proved that *Odier* and Co. gave full value for it.

Scarlett and *Platt* now shewed cause. The plaintiff received the note in payment of a debt due to him from *Odier* and Co. There is no ground whatever for supposing that he came by the note improperly. A party who receives in discharge of a debt a bill or note, immediately acquires a property in it, and a right to sue upon it. If there had been no debt due from *Odier* and Co. to the plaintiff, and he had sued as their agent, he must have shewn that they gave a consideration for it. In *Solomons v. The Bank of England* (a), it did not appear that the person who transmitted the note from *Holland* was indebted to his correspondent in *England*. But assuming that the plaintiff is identified with *Odier* and Co., and can recover only on their right, there is no ground for supposing that the latter took the note under circumstances which ought to have excited, in the mind of a prudent person, any suspicion that it had been improperly obtained. *Odier* and Co. were proved to be respectable merchants in the habit of transmitting bank notes to this country. Upon being required by the defendants to state how they acquired the note, they pointed out the source by giving the name and address of the person through whose hands the note had passed to them. The circumstances proved not only throw no suspicion on *Odier* and Co., but on the contrary are fair evidence that they took it in the ordinary course of trade, and the jury have found that to be the fact. In

(a) 13 *East*, 155.

Solomons v. The Bank of England (a), it appeared that at *Middleburgh* a 500*l.* bank note was rarely seen. It did not appear that the person who transmitted it from *Middleburgh* had given any thing for it. The only account given by the party who transmitted it, was, that he received it in payment for goods. The circumstances proved were calculated to raise suspicion that he had not obtained the note honestly, or in the usual course of business. If *Odier* and Co. had been plaintiffs, they would not have been bound to prove more than has been proved in this case. The jury have found that they took the note in the usual way in which such instruments are transferred, and there was ample evidence to support that finding.

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Bosanquet Serjt. and *F. Pollock* contra. The plaintiff is identified with *Odier* and Co., and cannot recover unless they have a good title to the note. The plaintiff was the agent of *Odier* and Co., and although they were indebted to him at the time when the note was remitted, he did not advance to them any money on the faith of this note. The effect of the argument on the other side, if it prevailed, would be that any person, who, in a foreign country, may have possessed himself of a bank note under circumstances which would prevent *his* recovering upon it, may, by remitting it to a creditor in this country, enable the latter to maintain an action upon it. In *Solomons v. The Bank of England (a)*, it did not appear whether there was an antecedent debt due to the plaintiff from his correspondents at *Middleburgh*. It is stated, indeed, by Lord *Kenyon*, that it did not appear that the

(a) 13 *East*, 135.

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plaintiff had given any consideration for it. *Solomons* received it as the agent of *Henriquez* and Co. of *Middleburgh*, and his right to recover was considered to depend upon their right. This case is precisely the same. The plaintiff is the agent in *England* of *Odier* and Co., and they are the agents in *France* of the plaintiff, they assist each other in carrying on money transactions, and at the end of the year divide the profits, but each is answerable for the paper transmitted to the other. Then what was the conduct of *Odier* and Co.? It does not appear from their own statement that they gave the full value for it; and if they gave less than the full value, that circumstance would raise a strong presumption that they obtained it improperly. They state that they bought it of *Emerique*, and that he bought it of *Duval*; but it is clear according to their own statement, that *Duval* took it under circumstances which, if the transaction had taken place in this country, would have prevented him from acquiring any property in it, *Gill v. Cubitt* (a), *Down v. Halling* (b), for he merely ascertained the genuineness of the note, and did not require the name of the person from whom he received it. If the instrument, therefore, is to be considered as one in which the property passes by delivery, *Duval* could not have recovered upon it; but here the note was not transferred to *Odier* and Co. by way of payment in the ordinary course of business, but as a subject-matter of sale, and having acquired it by purchase, they have no right to treat it as an instrument transferable by delivery. If it came to them merely by purchase, it must be subject to all the principles which govern matters of

(a) 3 B. & C. 466.

(b) 4 B. & C. 330.

sale. Here they seek to recover the instrument itself, the very paper in which they have acquired an interest by sale or transfer, and they ought, therefore, to have shewn that they gave full value for it. But, thirdly, this case is not to be considered in the same light as if the note had been taken by *Odier* and Co. in the ordinary course of payment in this country. For though such a note payable to bearer, generally speaking, passes by delivery to the person who takes it, it is a mere promissory note, and not transferable like a bill of exchange by the custom of merchants, but by the statute 3 & 4 *Anne*, c. 9. which makes a note in writing, signed by the party who makes the same, whereby such party promises to pay to any other person or his order any sum of money, assignable or indorsable over in the same manner as *inland bills of exchange* are, according to the custom of merchants. That statute made a promissory note transferable by indorsement in *England*; but in *France*, a promissory note made in *England* must still be considered a mere chattel. [Lord *Tenterden* C.J. Before the statute of *Anne*, a promissory note was not transferable in *England* by indorsement: but, by the law of *France* and other countries, is such an instrument transferable by indorsement? and if so, is it by the law of merchants or by positive enactment?] It appears from *Pothier Traite du contrat de Change* (a), that bills of exchange are not transferable in *France* by the law of merchants, but by a particular ordonnance; and it does not appear that there is any distinction between a bill of exchange and a promissory note in that respect. In *Carr v. Shaw*, cited in *Bayley on Bills*, 22. in an action

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(a) *Œuvres de Pothier. Dupin, Paris, 1825. vol. 3. p. 123, and see Part II. Article 2. Sect. v. Billets à Ordre, p. 222.*

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on a promissory note made at *Philadelphia*, the first count of the declaration stated that the defendant at *Philadelphia*, in parts beyond the seas, to wit, at *London*, &c., according to the form of the statute, &c., made his note in writing, &c. There were also the common money counts. The defendant demurred specially to the first count, and pleaded the general issue to the others. On the demurrer, the Court intimated a strong opinion that the statute did not apply to foreign notes, and advised the plaintiff to amend (a). Then if the instrument in question be not a promissory note transferable by delivery, it is like a parchment or paper, valuable as a security; it is a mere chattel, and where a chattel has been obtained by fraud or felony, the property in it does not pass, but remains in the original proprietor. If that be so, the property in this note remains in Mr. *Haselton*, from whom it was feloniously stolen, and *Odier* and Co. have no interest therein.

Lord TENTERDEN C. J. We are of opinion that the rule for a new trial must be made absolute. We think the plaintiff stands in the same situation as *Odier* and Co., who sent the note to him. They were mutually agents for each other. *De la Chaumette* was the agent in *England* of *Odier* and Co., and they were the agents in *France* of the plaintiff. It appeared, that at the time when the note was remitted to the plaintiff, the balance as between him and *Odier* and Co. was 1700*l.* in favour of the plaintiff. But he did not, in consequence of having received the note, make any further advance, or give any further credit to *Odier* and Co., than he would have

(a) See *Milne v. Graham*, 1 B. & C. 192. *Bentley v. Northhouse*, 1 M. & M. 66.

done if the note had not been transmitted. Unless, therefore, we were to lay down a rule that a party who holds a note, however obtained, may, by merely re-mitting it to a person to whom he is indebted, enable him to sue, we must say that the plaintiff must be considered as representing *Odier* and Co.; and that if he can recover at all, it must be upon their right. Then that brings it to the question, Whether *Odier* and Co. could recover; and that appears to involve two points: first, Whether *Odier* and Co. gave such value for the note, as to exempt them from any reasonable ground of suspicion of any knowledge that it had been improperly obtained. That is a question of fact. What the effect of that fact may be (if it be proved) we are not called upon now to decide. If a note of this description is not transferable abroad, it may be (I do not say it is) the law, that the person who takes it, although the transaction be clearly *bonâ fide*, cannot recover. There will be an opportunity given of raising that question upon the record. If the cause goes down to another trial, *Odier* and Co. may prove, as they probably will, that they gave such value as to exempt them from all ground of suspicion of any knowledge that this note was improperly obtained; and in order that they may be enabled to give that evidence, we think the cause should go to another trial. I have adverted to the other point of law, not to give any opinion upon it, but merely saying that such a point may be made; and if it should be made by the defendants, it may be raised upon the record. It is a question of law of very great importance, and upon which I should be exceedingly unwilling to give an opinion without hearing the question very fully discussed, and giving it very great consideration. On
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the one hand, we are to take care that we do not prevent the circulation of the Bank of *England* notes in foreign countries. It would be very inconvenient to merchants and travellers if we should do that. But, on the other hand, we must not shut our eyes against existing facts that come to our knowledge. It has now become to a certain degree the practice, when notes to a large amount are stolen, to get them conveyed abroad, in order that they may pass there, and that the persons who take them may sue upon them in *England*. We think, upon the whole, there should be a new trial, to give the plaintiff an opportunity of proving that *Odier and Co.* gave full value for the note, and of raising upon the record the other question.

Rule absolute.

The KING against The Inhabitants of RINGSTEAD.

Testator, by his will, devised to his daughter *Elizabeth*, the widow of his late son *T. M.*, part of a messuage or tenement therein described, to hold to her and her assigns for and during the term of her natural life, if she should so long continue a

UPON an appeal against an order of two justices for the removal of *Henry Manning*, *Rebecca* his wife, and their four children, from the parish of *Wellingborough*, in the county of *Northampton*, to the parish of *Ringstead*, in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The birth settlement of the pauper *Henry Manning* was in the parish of *Ringstead*. His grandfather *Thomas*

widow and unmarried, and from and after her decease, or day of marriage, which should first happen, he gave and devised the premises, before given to his wife, and also other real property therein mentioned, unto the four children of his late son, *T. M.* deceased, in fee: Held, that by this devise, the children of *T. M.* took no estate in any part of the property devised till after the death of *Elizabeth*, and consequently, that one of them, a pauper, who came, during the lifetime of his mother, to reside in the parish where the lands not given to *Elizabeth* for life were situate, gained no settlement by estate.

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Manning being seised in fee of the premises hereinafter mentioned, by will dated the 6th day of *January* 1800, duly executed and attested, (after devising five acres of land in *Ringstead* to his eldest son and heir *John Manning* in fee in the words following; that is to say, I give and devise unto my son *John Manning* all those my five acres, more or less, of copyhold arable land and ley ground, and one rood, more or less, of copyhold meadow ground, with their and every of their appurtenances, lying and being dispersed in the open and common fields and meadows of *Ringstead* aforesaid, now in my own occupation, and which I have duly surrendered to the use of this my will, to hold to him, his heirs and assigns for ever, subject nevertheless, and I do hereby subject and charge the same estate to and with the payment of 25*l.* of lawful money of *Great Britain*, unto my daughter *Mary* the wife of *Thomas Plant*, to be paid to her within twelve calendar months next after my decease,) gave and devised in the words following; that is to say, "I give and devise unto my daughter *Elizabeth*, the widow of my late son *Thomas Manning*, all that part of a messuage or tenement, with the appurtenances, which is now in the occupation of *Henry Lawford*, situated in *Ringstead* aforesaid, and adjoining the tenement in the occupation of *James Manning*, to hold to her the said *Elizabeth Manning*, and her assigns, for and during the term of her natural life, if she shall so long continue a widow, and unmarried, and from and after her decease or day of marriage, which shall first happen, I give and devise the said part of a messuage or tenement, with the appurtenances, and also all that the aforesaid tenement, with the homestead and appurtenances, in the occupation of *James Manning*; and also all that my
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close or orchard lying about the said homestead on the north side of a back lane, and now in the several tenures of myself, *Samuel Hackett*, and *Mary Whitney*, unto the four children of my late son the said *Thomas Manning*, deceased, namely, *Henry*, *John*, *Thomas*, and *Rebecca Manning*, to hold to them and to their several and respective heirs and assigns for ever, as tenants in common, and not as joint-tenants." The pauper is the *Henry Manning* mentioned in this last-mentioned devise, and is the son of the said *Elizabeth Manning*. In 1806 he gained a settlement by hiring and service in the parish of *Raunds*. Having some years afterwards become chargeable to *Ringstead*, he was removed, with his wife, to *Raunds*, by an order dated the 8th *January* 1817, which order never was appealed against. Between 1817 and 1819, when the property was sold to one *Moss*, he resided above forty days in the parish of *Ringstead*, his mother having up to that time continued, and then being, a widow, and unmarried.

Dwaris and *Amos* in support of the order. The residence of the pauper in *Ringstead* is admitted; the only question is, Whether he had such an estate as conferred a settlement. In *Rex v. Eatington* (a) it was certainly considered that a party must have a present interest in an estate in order to gain a settlement by residence upon it. But at that time it had been held that it was not sufficient to gain a settlement that a party had an estate in the parish where he resided, but that he must reside upon it. This opinion was corrected in the case of *Rex v. Houghton Le Spring* (b),

(a) 4 T. R. 177.

(b) 1 East, 247.

where

where it was decided that the owner of an estate had a right to reside in the parish where his property was situated, whether he occupied it himself or let it to a tenant. Supposing, therefore, that the pauper in this case took an estate in fee, expectant on the death or marriage of his mother, he had as much right to reside in the parish as if he had a reversion after a term of 1000 years. He could not be treated as a person intruding without a colour of right to consume the stock of others. Secondly, the pauper had under the will in question a present interest in the estate. The testator apparently meant to provide for all his family. First he provided for his eldest son and heir, next for the widow of his second son, and lastly for his grandchildren. Nor can it be supposed that he intended to die intestate as to any part of his property. If the grandchildren did not take a present interest no provision was made for their maintenance. It must be presumed that the testator intended to give to them immediately all the property devised to them except that which was expressly devised to their mother for her life, *Cook v. Gerrard* (a), *Doe v. Brazier* (b), *Simpson v. Hornsby* (c).

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Campbell, Humfrey, and M'Donnell contra. It is a clear principle of settlement-law that a party cannot gain a settlement by estate unless he has a freehold in possession. He must have an estate of which he may be disseised. [*Bayley J.* Upon that point the Court do not feel any doubt.] Then, as to the construction of the will. Until the death or second marriage of his

(a) 1 *Saund.* 181. (b) 5 *B. & A.* 64. (c) *Proc. in Ch.* 439. 452.

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mother, the pauper took no present estate, but a freehold in futuro by way of executory devise. The testator may have meant the devise to be immediate, but can it be certainly ascertained that he did so? The matter may be doubtful, but hitherto an heir at law has not been disinherited without express words or necessary implication. The testator might mean that all his property should go together to the grandchildren. He might suppose that their mother would provide for them as long as she lived or remained a widow, and on that account did not wish them to take the estate in question until her death or marriage. Of the cases cited *Doe v. Brazier* is the most like this; but there the devise to the testator's nephews might have failed altogether unless it had been held to give an immediate estate; and the decision of the Court that the devise was immediate appears to have been greatly influenced by that consideration.

Cur. adv. vult.

BAYLEY J. In this case the question is, Whether the pauper gained a settlement in *Ringstead* by estate. That depends entirely on the construction to be put on the will of his grandfather. If by that will he took an immediate estate he was settled in *Ringstead*, but otherwise he is not settled there. The words of that part of the will upon which the question depends are, "I give and devise unto my daughter *Elizabeth*, the widow of my late son *Thomas Manning*, *all that part of a messuage or tenement, with the appurtenances* (which is described), to hold to her the said *Elizabeth Manning*, and her assigns, for and during the term of her natural life, if she shall so long continue a widow and unmarried, and from

from and after her decease or day of marriage, which shall first happen, I give and devise the said part of a messuage, with the appurtenances, and also other real property (which is described), unto the four children of my late son the said *Thomas Manning*, deceased, namely, *Henry, John, Thomas, and Rebecca Manning*, to hold to them and their several and respective heirs and assigns for ever, as tenants in common, and not as joint-tenants."

The question is, Whether by that clause of the will he intended to give the grandchildren an immediate estate in the property not devised to *Elizabeth* for life. The words "from and after her decease or day of marriage," taken in their ordinary grammatical sense in the place where they occur, apply not only to the property before devised to the mother for life, but to all the other property. It has been contended that the children take no present estate, but a freehold in futuro, by way of executory devise. On the other hand, it has been said that although they take a reversion in the property devised to the mother for life, they take an immediate estate in that property which was not devised to her; and that these words "from and after her decease or day of marriage," are to be construed distributively, so that they apply to the property devised to the mother for life, but not to the residue; and if that be so, then the pauper and the other children of *John Manning* take an immediate interest in the residue. There is no doubt that in furtherance of the manifest intention of the testator, general words which, taken in their ordinary grammatical sense, apply to the whole property devised, may be taken distributively, and that reddendo singula singulis, they may be applied to that part of the property to which they appear by the context to be applicable, so as to

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to suffer other property to which in their grammatical sense they would apply, to pass immediately. But in order to warrant such a construction, it must appear manifestly from the other parts of the will that that was the intention of the testator. If there be nothing, therefore, to shew that that was the intention in this case, the words of the will being general must be construed in their ordinary grammatical sense, and then they will apply to all the property, and must have the effect of preventing any part of it from passing immediately to the devisee; and that part of the property in which an immediate estate is not given will pass to the heir at law during the life of *Elizabeth Manning*. The general rule is, that an heir at law can only be disinherited by express devise or by necessary implication; and by necessary implication is meant such a strong probability that an intention to the contrary cannot be supposed. Thus if the devise be to the devisor's heir after the death of *A.* the latter will take an estate for life by implication. But if the devise be to *B.*, a stranger, after the death of *A.*, no estate will arise to *A.* by implication, but the heir at law of the devisor will take during the life of *A.* The inference, in the first case, that the devisor intended to give a life-estate to *A.* is irresistible, because he could not without the grossest absurdity be supposed to mean to give his land to his heir at the death of *A.*, and yet that the heir should have it in the meantime; and that would be the case unless *A.* took an estate for life. But where the devise is not to the heir, however probable it may be that by fixing the death of *A.* as the period when the devise to *B.* is to take effect in possession, the devisor intended he should take it for life, yet it is possible to suppose that, intending the land to go to the

the heir during the life of *A.*, he left it for that period undisposed of, and, therefore, in that case it goes to the heir at law. Now in this case there is no express devise of the property in question during the life of *Elizabeth*. The devisees are not the heirs at law of the testator. They are strangers; and upon the principle, therefore, that the heir at law is not to be disinherited except by express words or necessary implication, the devise to the grandchildren after the death of *Elizabeth* passes to them an interest which is to take effect only on her death. The heir at law of the testator must have the estates during her life. The cases cited to shew that the words in this will ought to be construed distributively were *Cook v. Gerard* (a), *Simpson v. Hornsby* (b), and *Doe v. Brazier* (c). In the first-mentioned case Sir *R. Kempe*, Knight, was seised of the lands in question in fee, and was also seised of the reversion of other lands expectant upon the death of *Ruth Kempe*, his daughter-in-law (whereof *Ruth* had an estate for life for her jointure), and being so seised, the said Sir *R. Kempe* by his will devised that Dame *Elizabeth*, his wife, should have the free use of the demesne lands (being the lands in question) for one year after his death; and then, after stating that he was desirous to continue the capital messuage, with appurtenances thereto belonging, in the blood of the *Kempes*, in which it had continued for ages past, he devised the demesnes and the reversion to the lessor of the plaintiff, habendum immediately from and after the expiration of one whole year next after his decease, and the decease of the said *Ruth Kempe*, (who was tenant for life of the lands whereof the testator had the reversion), for the term of the life of the said *Thomas Kempe*, doing no strip

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(a) 1 Sand. 183. (b) Prec. in Ch. 439. 452. (c) 5 B. & C. 64.

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or waste. The testator further directed that *Thomas Kempe*, in consideration of the devise, should, immediately after the death of *Ruth Kempe*, pay to three persons therein mentioned annuities of 20*l.* each, by half-yearly payments. The devisor died, and the year expired. It was contended that it was necessary in order to effect the intention of the testator, that the words should be taken distributively, so that the devisee should have the jointure lands after the death of *Ruth*, and the demesne lands after the testator's death; first, because if they descended to *Mary Kempe*, his daughter and heir, she would probably change her name by marriage, and then the intention of the devisor that the demesne lands should remain in the name of the *Kempes* would be defeated. Secondly, if *Ruth* died within the year after the testator, the annuities given by the will could not be paid unless the devisee took the land immediately after the death of *Ruth*, notwithstanding the year was not expired. And, thirdly, if the demesne lands should descend to the heir in the meantime until the death of *Ruth*, then he might commit what waste he pleased, and there would be no means to prevent it, which would be directly against the true meaning of the testator. On the other hand, it was insisted that the demesne lands should descend to the heir at law until the death of *Ruth*, and that the words of the will should be taken as they were, viz. jointly, and not distributively; and the rule that the heir at law is not to be disinherited but by express words or necessary implication was relied upon. The Court of K. B. held that the words of the will should be taken distributively, and that the lessor of the plaintiff had good title to the demesne lands after the expiration of the year, and before the death of *Ruth*, and judgment was given for the plaintiff.

In

In the course of the argument the following case was cited from *Moore's Reports*, 7.: "A man seised of a manor, parcel in demesne and parcel in service, by his will devised to his wife all his demesne lands for her life, and also by the same will devised to her all the services and chief rents for fifteen years; and further devised all the manor to another after the death of the wife, and it was adjudged that the devisee should take nothing until after the death of the wife, although the fifteen years had expired, and that the heir at the expiration of the fifteen years should have the services and chief rents during the wife's life." In argument in the Exchequer Chamber this case was relied upon in support of the writ of error. But *Saunders* gave this answer to it, viz. "There the second devisee was to take nothing by the words of the will until after the death of the wife, and the words being express, no construction could be made against them, which he said was the reason of the case; but he said if the will had been, that the second devisee should have the manor after the expiration of fifteen years, and after the death of the wife, in that case it should be construed distributively, viz. that the second devisee should have the demesne lands after the death of the wife, and the rents and services after the expiration of the fifteen years." If the devise had been as it was put hypothetically by *Saunders*, the intention of the testator would have been manifest to pass by the will to the second devisee the reversion of all the lands previously given to the wife for life and for years; and then, in furtherance of that intention, the words must have been construed distributively; but inasmuch as there was nothing on the face of the will to shew that that was the intention of the testator, effect was given to the

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words taken in their ordinary grammatical sense, and the heir at law at the end of the fifteen years took the services and chief rents for the life of the wife. The judgment of K. B. in *Cook v. Gerard* was affirmed in the Exchequer Chamber. Now it is to be observed, that in that case there were circumstances to shew that the testator must have intended that the heir at law should not take the demesne lands during the lifetime of *Ruth*; first, because his wish was that they might continue in his name; secondly, because he directed annuities to be paid half-yearly, immediately after the death of *Ruth*; and, thirdly, because he directed that no waste should be committed. That case only shews that, in furtherance of the intention of the testator, words which, taken in their grammatical sense, are joint, and apply to two classes of property, may be construed distributively; but not that they must be so construed. The next case relied upon was *Simpson v. Hornsby (a)*. There the testator having a wife and two daughters, his heirs at law, devised the lands and tenements to his wife for life, and then to one of his daughters after the death of his wife. Now it is perfectly clear that by a devise to an heir at law after the death of the wife, the wife takes by way of implication of necessity; because the intent is plain that the heir shall not take till after the death of the wife. In *Viner's Abr.* the case of *Hutton v. Simpson*, as reported in 2 *Vern.* 723., is cited to shew that a devise to one of two daughters, being heirs at law, after the death of the devisor's wife, though the daughter be but one of the co-heirs, passes an estate for life to the wife by implication. But the report in *Vernon* in that respect is at variance with that in *Chancery Precedents*, 439. 452.; and also with the account in the

(a) *Prec. in Ch.* 439. 452. *Reg. Lib. B.* 1716. fol. 158.

register-book, which I have examined. There it appears the testator, *Thomas Addison*, had a wife, *Frances*, and two daughters, *Bridget* and *Jane*, and devised to *Frances Addison*, for her life, as a jointure, all his messuages, houses, lands, tenements, rents, in *Turpentine*, in the county of *Cumberland*, (the house called *James House*, and the lands devised to buy bread weekly for the poor of the said parish only excepted,) and bequeathed to her specific articles of furniture, &c., all which he bequeathed to her, and were thereby intended and declared to be in full of her jointure, and in lieu of her dower, or thirds, at common law or in equity, or by any local custom; and after the death of his said wife, devised all his houses, messuages, lands, tenements, rents, fines, heriots, boons, duties, and services in *Turpentine* aforesaid (except as before excepted), and all his houses, messuages, lands, and tenements in *Whitehaven*, his tenements in *Bigg Croft*, and all other his real estate whatsoever, not before devised, unto his daughter *Bridget Addison*, and the heirs of her body to be begotten; and, for want of such issue, to the said *Jane*, his daughter, for her life, and after her decease to the first, second, third, &c. sons of his daughter *Jane*, and the heirs of the body of such son and sons successively; and for default of such issue, to the daughter and daughters of the said *Jane*, (*the wife of Simpson*,) and the heirs of the body of such daughter and daughters, as tenants in common, and not as joint-tenants; and for want of such issue, to the said *Thomas Addison's* right heirs for ever; and he made the said *Bridget Addison*, his daughter, sole executrix, and the defendants *Gilpin*, *Blackclock*, *Coates*, and *Senhouse* overseers of his will. *Bridget* married *Hutton*, and had issue *Addison Hutton*, and died in the testator's lifetime. *Jane* married *Simpson*. After the testator's death *Simpson*

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and his wife filed a bill against *Frances*, the widow, and the overseers of the will, charging, that *Frances*, pretending she was entitled not only to the lands at *Turpentine*, but to all the testator's other lands for life, and that she possessed the title-deeds of his real estate, and refused to discover the same; and pretending also, that after her death *Addison Hutton* would take as heir of *Bridget's* body; and prayed, inter alia, an account of the rents of the real estate. *Frances* put in her answer, but died before the hearing; and the suit was revived against her executors. *Richard Hutton* and *Addison*, his son, also filed a bill against *Frances Addison* and the overseers of the testator's will, and prayed that *Richard Hutton* might have the management of the lands given to *Bridget* and the heirs of her body. This bill was also revived on the death of *Frances*. On the hearing of both causes, Lord Chancellor *Cowper* was of opinion that *Frances* took nothing by implication, and that she was entitled to a life-estate in those lands only which were expressly devised to her; that *Bridget*, had she survived the testator, would have taken the other lands immediately upon the testator's death, and that she was to wait till the death of *Frances* for those lands only which were given to *Frances* for life; and that as *Bridget* died in the testator's lifetime, *Jane* became entitled to the lands, not expressly devised to *Frances*, immediately upon the testator's death, and might have entered thereon; but as she had not entered, he refused an account against the personal estate of *Frances*, and dismissed the first bill; and as *Jane* had profited so much by an unforeseen accident, the Chancellor left *Jane* to her remedy at law against the *Huttons*, for an account of rents, and retained *Hutton's* bill, that he might, if he thought fit, try the title at law; and if he did

did not, the deeds were to be delivered to *Jane*; but the Lord Chancellor stated that the present title to the estate was merely a question of law, and there was no impediment to try it at law.

The only question was, not whether the estates had come into the possession of *Jane*, but whether there should be an account of the rents and profits? In the first case the Court of Chancery thought, there having been no entry by *Simpson*, he and his wife were not entitled to any account of the rents, and the bill was dismissed on that ground. That being so, the question whether *Jane* was entitled to the actual possession upon the death of *Frances*, the tenant for life, could not arise. There could be no appeal against the decree in respect of any opinion pronounced by the Lord Chancellor as to the period of time when the property vested. In the other case, Lord *Cowper* dismissed the bill as to the rents and profits, because, as *Jane* had profited so much by an accident unforeseen to the testator, she ought to be left to recover the same at law. In neither of these cases did the question necessarily arise, Whether the devisee took an estate immediately on the death of the testator? It was insisted in argument, that the son of *Bridget* was entitled to the estate on the death of his mother; but Lord *Cowper* was of opinion, that the words "heirs of the body," as used in the will, being therein used and intended only as words of limitation of the estate devised, and not as words of purchase or description of the person of the devisee intended to take by the will, the said *Addison Hutton* could not, in virtue of those words, take by purchase or immediate devise; and that, therefore, the estate devised to *Bridget* and the heirs of her body did, immediately on the de-

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cease of the testator, (*Bridget* dying in his life-time,) vest in *Jane Simpson*. Another question was made in argument, Whether *Jane* was so entitled? It was insisted she was not entitled till after the death of the widow, because *Frances* had an estate for life by implication in the whole; but the Lord Chancellor was of opinion, that *Frances* had not any estate in those lands, not expressly devised to her, by implication, and that no real estate was devised to *Bridget*, to take effect not till after the death of *Frances* the wife, but what was expressly given to the wife, the rest of the real estate being *intended to pass by the will immediately to Bridget, had Bridget survived the testator*. It appears, therefore, from this statement of the case, that Lord *Cowper* thought that the wife took no estate by implication in the land not specifically devised to her for life; but that the rest of the real estate was *intended to pass by the will immediately to Bridget*, and in order to give effect to that intention he distributed the words, and read the will as if the testator had devised specific lands to his wife for life; and from and after the death of his wife to *Bridget*, and as if he had devised all the residue of the said real property to *Bridget*, without making that devise subject to any qualification or contingency. The foundation of the opinion of Lord *Cowper*, that the words ought to be read distributively, was because that appeared to be necessary, to effect the intention of the testator, that the lands should pass immediately to *Bridget*. The same observation applies to *Doe v. Brazier (a)*. There the testator, by his will, bequeathed the rents of one dwelling-house, situate in *New Brentford*, to *Charles Brazier* for his life; and from and after the decease of

(a) 5 B. & A. 64.

the said *Charles Brazier*, he bequeathed the same rents, *together with* the rents of all his other houses and lands, unto his nephews and niece therein mentioned, for their lives and the life of the survivor; and from and after the decease of the survivor, he gave and devised all his houses and lands to trustees in trust to sell the same, and to pay the produce of such sale unto such of the children of his nephews and niece as should be living at the time of the decease of the survivor; and then devised all the residue of his estate to *Charles Brazier*: it was held that upon the death of the testator, the nephews and niece took an immediate estate for their lives, and the life of the survivor, in the rents of all the houses and lands, except the house specifically bequeathed to *Charles Brazier* for his life. The Court there were of opinion, that it was manifestly apparent on the face of the will, that though the testator intended *Charles Brazier* to take a life-estate in one house only, he meant to dispose of his property in the other houses, and that which appeared to be the manifest intention could not be effected without giving an immediate interest in the latter to his nephews and niece. The Court, in order to effect the intention of the testator, were compelled to give to the words a construction different from that which belonged to them in their ordinary grammatical sense. In the case before the Court, there is nothing to shew that the testator intended his grandchildren to take upon his death an immediate interest in the property devised, or to disinherit his heir at law; and that being so, the words must be construed in their ordinary grammatical sense. We are of opinion that the pauper did not take an immediate estate under the will of his grandfather; that he is entitled to no estate whatever until the tenant for life die,

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die, and, consequently, his settlement is not in *Ringstead*. The order of sessions must therefore be quashed.

Order of sessions quashed.

(a) See *Boon v. Cornforth*, 2 Ves. sen. 277.; *Dyer v. Dyer*, 1 Mer. 414.; and *Aspinall v. Petevin*, 1 Sim. & Stu. 544.

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The concluding words of a warrant of commitment must be so limited as to have direct reference to the offence imputed in the preceding part; and, therefore, where a commitment, after reciting that the bankrupt had surrendered, and that the commissioners examined him touching his trade, &c., and caused such examination to be reduced into writing, and read over to him; to which examination the bankrupt did refuse to sign his name (not having a reasonable objection to the wording thereof or otherwise), required the gaoler to detain the bankrupt in custody until such time as he should submit himself, and full answer make to the satisfaction of the commissioners to all such questions as should be put to him, and sign and subscribe such examination as aforesaid, was holden to be void.

A WRIT of habeas corpus had been obtained, directed to the keeper of the castle of *Lincoln*, commanding him to bring up the body of *Thomas Leake*, for the purpose of being discharged out of custody. The warrant of commitment, which was dated 30th *March* 1824, recited, that a commission, dated the 10th *February* 1824, had issued against *Thomas Leake*; that the commissioners adjudged him to be a bankrupt; that he had surrendered to the commissioners, in order to enter upon and pass his examination, and to make a full disclosure of his estate and effects. It then stated that the commissioners, having taken the oath prescribed by the stat. 5 G. 2. c. 30., did examine *Leake* touching his trade, dealings, and effects, and did cause such examination of *Leake* to be taken down and reduced into writing and read over to him, to which examination, so taken down and reduced into writing and read over as aforesaid, *Leake* did refuse to sign and subscribe his name (not having a reasonable objection either to the wording thereof or otherwise allowed by them); they therefore willed and required that the bankrupt should be taken to his majesty's prison the castle of *Lincoln*, and there de-

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livered to the keeper of the said prison, who was thereby required and authorized, by virtue of the commissions and statutes aforesaid, to receive *Leake* into his custody, and him safely to detain and keep, and detain without bail or mainprise, *until such time as he should* submit himself to them the commissioners and full answer make to their satisfaction to all such ^{step} questions as should be put to him, and sign and subscribe such examination as aforesaid, according to the true intent and meaning of the said act of parliament of the 5 G. 2. c. 30.

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Tomlinson. Two objections are taken to the commitment: first, that the questions put to the bankrupt ought to have been stated in the commitment; secondly, that the conclusion makes the commitment void, because the bankrupt is thereby ordered to be detained not only until he signs the examination, but until he answers further questions. As to the first objection, the ground of commitment is, that the bankrupt refused to sign the examination, and not that he refused to answer any questions. The only object of stating the questions in the commitment is to enable the Court to judge whether they be lawful. But if they are not objected to by the bankrupt, no such question can arise, and it must be unnecessary to set them out in the warrant. *Ex parte Page (a)*. Then, as to the other objections, *Nobes v. Mountain (b)* is an authority in point. There a commitment “for refusing to be sworn until such time as the bankrupt shall submit himself to us the commissioners, and take the oath prescribed by law for that purpose, and full answer make to our satisfaction to the

(a) 2 B. & B. 568.

(b) 3 B. & B. 233.

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questions which may be put to him by virtue of the commissioners," was holden to be sufficient.

Humphrey contra. The commitment is bad. Here the only offence imputed to the bankrupt by the commitment is, that he refused to sign the examination. It appears that he did submit himself to be examined, and that he answered all lawful questions. But the commitment requires the gaoler to detain the bankrupt in custody, not only until he signs the examination, but until he shall submit himself and answer. According to the language of the commitment, he would not be entitled to be discharged upon signing the examination; he must do something else. A warrant concluding "till he conform to our authority," was holden to be had in *Braycey's case* (a). So where it concluded, "or otherwise be discharged by due course of law," *Hollingshead's case* (b). So a commitment "till he shall full answer make to all such questions as shall be put to him as aforesaid," was holden to be bad, *Miller's case* (c), although these were the general words in the statute. The words in the conclusion of the warrant must be narrowed, so as to have a direct reference to the offence imputed to the bankrupt in the preceding part.

BAYLEY J. It is not necessary to decide whether the questions and answers should have been set out in the commitment. My present impression is that that was unnecessary. But I think the warrant is bad because the conclusion is improper. If the language of

(a) 1 Salk. 348. 1 Ld. Raym. 99.

(b) 1 Salk. 351. 2 Ld. Raym. 851.

(c) 2 Sir W. Bl. 882.

the conclusion be such as to authorize the bankrupt to be detained in custody longer than by law he is liable to be detained, the commitment will be bad. It ought to have a conclusion pursuant to the act of parliament. In *Yazley's* case (a) the defendant was committed by the secretary of state under the statute 35th of *Elizabeth* for refusing to answer whether he was a jesuit, &c. and on a habeas corpus he prayed to be bailed. The exception to the commitment was, that the conclusion thereof was, "there to remain until he shall be thence discharged by due course of law," when the words of the statute are, "until he shall answer unto the questions," and therefore the commitment ought to be special according to the statute; and for that objection the court held the commitment ill. In *Groome v. Forrester* (b), the subject is very fully considered, and treated with great ability. There the conviction was by two magistrates, under the statute 17 G. 2. c. 38., upon complaint of the overseers of a parish against the late overseer for refusing and neglecting to deliver over to them a certain book belonging to the parish called the Bastard Ledger, convicting him of the said offence, and adjudging that he should be committed to the common gaol, *to be safely kept until he should have yielded up all and every the books concerning his said office of overseer belonging to the parish*, was held void, as to the adjudication respecting the imprisonment, for excess, the same extending beyond what was previously required of the person convicted; and a warrant of commitment founded on this conviction, and directing the gaoler to keep him in the terms of the adjudication, was also holden void *in toto*. In *Rex v. James* (c) a commitment for a contempt, not being for a time certain, was held to be bad. I take it to

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(a) *Carth.* 291.(b) 5 *M. & S.* 314.(c) 5 *B. & A.* 894.

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be clear, therefore, that a conclusion in a warrant, which by its language will justify a detention for a longer period than by law it ought to do, must be bad. The commitment in this case is founded on the statute 5 G. 2. c. 30. s. 16., which enacts that in case any bankrupt shall refuse to answer, or shall not fully answer to the satisfaction of the commissioners, all lawful questions put to him by the commissioners, or shall refuse to sign and subscribe his examination so taken down or reduced into writing as aforesaid (not having a reasonable objection either to the wording thereof or otherwise, to be allowed by the commissioners), it shall be lawful to the commissioners to commit him to such prison as the commissioners shall think fit, there to remain, without bail or mainprise, until such time as such person shall submit himself to the commissioners, and full answer make to the satisfaction of the commissioners to all such questions as shall be put to him, and sign and subscribe such examination as aforesaid, according to the true intent and meaning of that act. The words in the latter part of the section apply to all the cases mentioned in it, and must be construed distributively. If the party is guilty of contumacy, either by refusing to answer or by not answering fully the questions then put to him, or by refusing to sign the examination reddendo singula singulis, he may be committed, as the case may be, either until he answer, or until he answer fully, or until he shall sign the examination. The words in the concluding part of the warrant ought to be limited so as to have direct reference to the specific offence imputed to the bankrupt in the preceding part. Here it does not appear that the bankrupt refused to answer, or that he did not fully answer, but the only charge is that he refused to sign the examination. The form of the concluding part of the warrant should have

have been, that he be committed until he sign the examination. It seems to me that the language of this commitment assumes that the bankrupt has not submitted to undergo any examination. It ought to have recited the facts truly; viz. that he had answered fully, but that he had refused to sign the examination, and to have concluded that he be committed until he shall sign the specific examination; whereas the form used is applicable to a case where the bankrupt has refused to answer all the questions put to him. The case of *Nobes v. Mountain* (a) was properly decided; for there the party refused to answer, which is the first step. For these reasons I think that the commitment is bad, and the bankrupt is entitled to be discharged.

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LITTLEDALE J. I am of the same opinion. The statute authorizes the commissioners of bankrupt to commit in three cases:—if the party altogether refuses to answer; secondly, if he does not answer fully; and, thirdly, if he refuses to sign the examination. It appears, from the warrant, that the bankrupt did surrender; that the commissioners did examine him, and cause his examination to be reduced into writing; to which examination, so taken down and reduced into writing, the bankrupt refused to sign and subscribe his name. He had so far complied with the act of parliament that he had answered fully to the satisfaction of the commissioners all lawful questions put to him. That being the case, it seems to me the commissioners were warranted in committing him only until he signed that examination. It does not appear that any further questions were intended to be put to him. The commissioners had no power to commit him for not doing any other thing,

(a) 3 B. & B. 234.

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and still less to commit him for not doing that which by the warrant it appears he had done. According to this warrant, the gaoler would be bound to detain the bankrupt until those other things are done. The commitment, therefore, may have the effect of causing him to be imprisoned for a longer period than the commissioners are authorized to commit him for. If it had appeared that he had made any objection to the questions put to him by the commissioners, it might have been necessary to set them out on the warrant, in order that the Court might judge whether they were proper : but as he made no objection to those questions, it seems to me it was not necessary to set them out in the commitment.

PARKE J. I am of the same opinion. Two objections have been made to this commitment; first, that the questions put to the bankrupt are not stated in the commitment; secondly, that the conclusion is bad. I think it was not necessary to set out the questions in this commitment, because it must be taken from the warrant that the bankrupt has answered all questions put to him. If he had been committed for refusing to answer particular questions, they must have been set out, in order that the Court might judge whether the questions were lawful. Upon the second objection, I think the warrant is bad. The bankrupt is bound to answer all lawful questions put to him; and when it appears by the commitment that he had no reasonable objection, it must be assumed that he has answered all questions. Here the commissioners commit him for not submitting himself to a further examination; for the gaoler is required to detain him in prison until he answer further questions. Now, he having been examined, and having answered to the satisfaction of the commissioners, I think it is quite clear they

they had no power to order him to be detained in custody until he submitted to a further examination. The case of *Nobes v. Mountain* (a) is distinguishable, because the bankrupt, who was bound to submit to answer all such questions as should be put to him, refused to be sworn or examined at all. He was, therefore, properly committed until he submitted himself, and took the oath. I think the bankrupt is entitled to his discharge.

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(a) 3 B. & B. 234.

J. G. SPARROW, T. SIMPSON, W. WALFORD, and
J. PECKOVER, *against* CHISMAN.

ASSUMPSIT by the Plaintiffs, as indorsees, against the Defendant as acceptor of two several bills of exchange, each being for 1500*l.*, drawn by *J. Peckover*, one of the Plaintiffs. Counts for money lent, &c. Plea, the general issue. At the trial before *Garrow* Baron, at the Summer assizes for the county of *Essex*, 1828, it appeared that the Plaintiffs, who were bankers at *Chelmsford*, sought to recover from the Defendant the sum of 3000*l.*, the amount of the two bills of exchange drawn on the 17th of *Feb.* 1826, by the Plaintiff *Peckover*, upon and accepted by the Defendant. The defence was, that the Defendant had not received any valuable consideration for these bills from *Peckover*. It appeared that he, for some time past, had had private transactions with the Defendant, and had advanced to him a sum of 4000*l.*, which, however, was understood between them to be the capital of *Peckover*'s son,

Where one of several partners in a banking-house drew a bill in his own name, upon a third party, who accepted the same, upon condition that the drawer should provide for the same when due: Held, that all the partners in the banking firm could not recover on the bill.

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who was to become a partner with the Defendant. This sum being in the Defendant's hands, *Peckover*, on the 18th of *February* 1826, requested the Defendant to accept two bills of exchange, each being for 1500*l.* at two months after date. The Defendant, after some hesitation, consented to accept them. *Peckover* then gave him the following memorandum in writing: — "I hereby hold myself responsible to you for the due payment of your acceptances for 3000*l.*, and I also engage to leave in your hands 4000*l.*, which is placed with you as my son's share of capital in your house, in the event of his becoming a partner." Upon this evidence, *Garrow* B. told the jury to find for the Plaintiffs, if they thought, under all the circumstances, *Peckover* gave a valuable consideration for the bills. The jury having found a verdict for the Plaintiffs, a rule nisi was obtained for a new trial, upon the ground that, as one of the Plaintiffs had promised to provide for the bills, the others who, being his co-partners, were bound by his acts, could not maintain this action, *Richmond v. Heapy* (a).

Gurney and *Brodrick* now shewed cause. The case was *correctly* left to the jury, and there was abundant evidence to warrant them in finding that the bills were accepted for a valuable consideration, viz. on account of the 4000*l.* which *Peckover* had previously lent to the defendant.

BAYLEY J. A party to whom an acceptance is given upon a condition that he will provide for it when due, and who does not perform that condition, cannot sue the

(a) 1 Stark. 204. See *Jacaud v. French*, 12 East, 317. *Bolton v. Puller*, 1 Bos. & Pul. 539.

acceptor;

acceptor; and if *Peckover*, therefore, could not have sued alone, how can he sue jointly with others? His partners, being bound by his acts, cannot recover through him. The rule for a new trial must therefore be made absolute.

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LITLEDAL and PARKE Js. concurred.

Rule absolute.

Spankie Serjt. and *Chitty*, were to have supported the rule.

HARRISON *against* SMITH.

THE writ in this case was returnable on the first day of *Hilary* term. The declaration was filed conditionally on that day, and bail above duly put in. On *Saturday* the 31st of *January*, a demand of plea was served on the defendant's attorney; and judgment was signed, for want of a plea, on the 2d of *February*. A plea was filed the 3d of *February*: it appeared that the office of the clerk of the judgments was closed on the 2d, but opened on payment of a fee. The office of clerk of the papers was opened on that day, and plea searched for, and a plea might have been filed on that day. *Hutchinson* had obtained a rule nisi for setting aside the judgment for irregularity.

A judgment
for want of a
plea cannot be
signed on a
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dicus.

Archbold shewed cause. In *Mesure v. Britten* (a) it was decided, that if a rule to plead expire on the 2d

(a) 2 *H. Bl.* 616.

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February, a dies non juridicus, the defendant is bound to plead on that day. Now, as pleading is an act supposed to be done in open court, it seems to follow that if a defendant is bound to plead on that day, judgment may also be signed on that day.

LITLEDALE J. I have no doubt whatever in this case. There are certain days, as well as *Sundays*, which are dies non juridici. On those days the Court cannot do any judicial act. The offices may be opened for the convenience of the suitor, and rules may be drawn up, but then they are entitled as of the preceding day. If the clerk of the judgments were to open the office on *Sunday*, a judgment signed on that day would be irregular. The 2d day of *February* is a dies non juridicus, and I cannot altogether accede to the case of *Mesure v. Britten*. It seems to me that a party has the same time to plead when the rule expires on a dies non as he would have if the rule to plead expired on a *Sunday*. In that case he might plead on the *Monday*.

PARKE J. concurred.

Rule absolute.

*See Hastings v. Woodcock & Ad. 11th Mo
 Evans v. Elliot 9 Ad 122 542
 Doe dec. Riggall v. Ranton 8 Ad 122 547*

1829.

POPE and Another, Assignees of GARBET, a
 Bankrupt, *against* BIGGS.

DEBT for use and occupation, money paid, laid out, and expended, had and received, and on an account stated. Plea, nil debet. At the trial before Gaselee J., at the Summer assizes for the county of Berks, 1828, it appeared that on the 20th of February 1827, a commission of bankrupt issued against Garbet, and that he before and at the time of his bankruptcy was mortgagor in possession of six houses at *Southern Hill*, near *Reading*, Berks, which in the years 1823 and 1824 he had mortgaged to various persons. The defendant was tenant of one of the houses, at the rent of 65*l.* a year, under an agreement with Garbet, the bankrupt, and had in the character of agent to the bankrupt, received his rents of the other houses, and applied them to pay the interest due on the mortgages, and had rendered him an account of the rents received and disbursements made up to *Christmas* 1826. The assignees in this action sought to recover from the defendant 48*l.* 15*s.*, being three quarters of a year's rent of the house occupied by him, which became due at *Lady-day* 1828, and various sums received by him on account of rent from the tenants after the bankruptcy, in the years 1827 and 1828. The tenancies of the several tenants all commenced subsequent to the mortgages, but while Garbet had the entire control of the premises. The defendant sought to discharge himself in part by reason of payments made by him in those years to the mortgagees on account of

A mortgagee having given notice to the tenants holding the mortgaged premises under leases granted by the mortgagor after the mortgage, is entitled to receive from those tenants the rents actually due at the time of the notice, as well as those which accrued due afterwards.

And where such rents had been received by the agent of the mortgagor after his bankruptcy, and were not actually paid over: Held, that the agent might retain such rents in order to pay the interest accruing due on the mortgage to the mortgagee, who had required him to do so, and that the assignees could not recover them.

1829.

Pore
against
Biggs.

interest which had become due to them on their mortgages, and as to the residue by reason of notices given to him on the part of the mortgagees subsequent to the bankruptcy. It appeared that after the bankruptcy, on the 22d of *February* 1828, the mortgagees gave notice to the tenants of the several houses that the interest was in arrear, and required them to pay the amount of such interest in part of the rent, and similar sums out of future rents, until further notice; and that in default of such payment, they, the mortgagees, would pursue such remedies as were allowed by law for recovering the same. At the time when this notice was delivered to the tenants, there was rent in arrear, and other rents subsequently became due; and all these rents had been received by the defendant, and applied by him from time to time to pay off the interest due to the mortgagees, with the exception of his own rent, and of a small sum, which together were not more than sufficient to meet the next half year's interest on the mortgages, which would become due in about three months after the commencement of the action. It was contended by the plaintiff that the defendant could not avail himself of any of these payments, because if the mortgagor had brought an action against the tenants themselves they could not have pleaded that the mortgagor *nil habuit in tenementis*, and consequently could not have denied his right to recover the rent; and, secondly, assuming that the tenants would have been justified in paying to the mortgagees the rents which became due *after* the notice, they were, at all events, liable to pay to the mortgagor the rents which had accrued due before the notice; and, thirdly, that the defendant having received the rents in the character of agent for the bankrupt, could not set up

up the rights of any other persons to discharge himself. The learned Judge was of opinion that the defendant had rightly made all the payments, and was entitled to retain the residue of the rents to countervail the accruing arrears of interest, and consequently that the plaintiffs were not entitled to recover; and he directed a nonsuit to be entered, but reserved liberty to them to move to enter a verdict for such sum as the Court should think right. A rule nisi for entering a verdict for the plaintiffs having been obtained by *Russell* Serjt. in last *Michaelmas* term,

1829.

POPE
against
BIGGS.

Talfourd now showed cause. The defendant is entitled to the benefit of the several sums paid by him to the mortgagees, provided the tenants would have been justified in paying the mortgagees those sums; and after the notices given he holds the residue for their benefit. In fact the bankruptcy of *Garbet* determined the defendant's authority to act as his agent; he afterwards received the rents of others, and retained his own, as a stakeholder, for the parties entitled to them. The question then is, Whether a mortgagee may by law stop the rents in the hands of the tenants before they are paid over to a mortgagor in possession. *Moss v. Gallimore* (a) establishes that a mortgagee after giving notice of the mortgage to a tenant in possession under a lease *prior* to the mortgage, is entitled to distrain as well for rent in arrear at the time of the notice, as for that which accrues due afterwards. The only difference between that and the present case is, that here the tenancies were created by the mortgagor

(a) *Doug.* 279.

1829.

Form
against
Bills.

after the mortgage; there the tenancies were created before. But that can make no difference in principle. It will, indeed, be insisted upon that as the defendant and the other tenants came into possession under the mortgagor, they cannot dispute his title; and that they were bound to pay the rents to him until they were actually evicted; and *Alchorne v. Gomme* (a) will be relied upon; but that case, even if it be sustained, is not decisive of the present. There, in answer to a cognizance alleging a tenancy to two persons named *Douglas Thompson* and *Henry Thompson*, the plaintiff in replevin pleaded in bar, that before the alleged demise to himself, one *Thomas Rumball* was seised of the premises, and, being so seised, mortgaged them in fee to one *Collins*, and that *Douglas Thompson* and *Henry Thompson*, under colour of a pretended agreement between them and *Rumball*, by which no interest passed, demised to the plaintiff, after which *Collins* confirmed the demise so made to the plaintiff, and required him to attorn, which he did, and afterwards paid the rent under pressure of distress. This was holden ill, as amounting only to a special plea of *nil habuit in tenementis*; but there the tenant did not insist that his landlord's title being defeasible had expired, but that he had no legal title, and the mode in which he alleged the want of title in his landlord was immaterial; and he stated no eviction by title paramount, but a mere request on the part of a stranger that he would attorn, for there the party mortgaging was not the party who demised, but a stranger. But where a mortgagor in possession demises, it is otherwise; for the mortgagor

(a) 2 Bing. 54.

has a title as between him and the tenant, so long as the mortgagee pleases, but no longer; and there is no inconsistency in allowing the tenant to show that a defeasible title has been defeated. The mortgagor is not properly described as tenant to the mortgagee at all; for he may be ejected not only without notice, but without even a demand of possession; this Court having in the case of *Doe dem. Roby v. Maiscy* (a), refused a rule for a new trial on this ground; and therefore the mortgagor is at any moment a trespasser when the mortgagee chooses so to treat him. The relative situation of mortgagor in possession and mortgagee is peculiar; the former is rather agent for the latter than tenant; and the authority of such agent is at any time revocable. So long as that authority continues, the payment of rent by the tenants to the mortgagor is valid; but as soon as the principal countermands, he is entitled to receive the whole rents actually unpaid, past as well as future. In further confirmation of this view of the case, it may be observed, that the mortgagor cannot make a lease to bind the mortgagee; and if he make a lease, the mortgagee may proceed to eject the lessee without notice, *Keech v. Hall* (b). But if the mortgagee adopt the acts of his agent the mortgagor, and treat the lessee as his, the mortgagee's, tenant, he thereby confirms the lease. If he does so, and the tenant attorns, he becomes the tenant of the mortgagee, and is bound to pay the rents to him whenever required. From the time of the notices in this case the tenants became in fact tenants to the mortgagees, the rents then accruing belonged to them, and the defendant

1829.

 PORN
 against
 BROS.

(a) 8 B. & C. 767.

(b) Doug. 21.

1829.

 FORK
 against
 BILLS.

properly retained all the monies in his hands for their benefit.

Curwood, contra. The mortgagor having been in actual possession at the time when he demised the premises, the persons who became his tenants under that demise cannot controvert his title at the time of the demise. *Moss v. Gallimore* (a) was the case of a lease made prior to the mortgage. In *Keech v. Hall* (b), the lease was made subsequently to the mortgage. That case, however, only shews that the mortgagee may, at his election, treat the lessee (who comes in under the mortgagor), either as tenant or as trespasser, but not that he is bound to treat him as a trespasser. He may adopt the acts of the mortgagor and confirm his lease. But in that case the lessee (who came in under the mortgagor), can only be considered the tenant of the mortgagee from the time when the latter, by giving notice of the mortgage, made his election to consider him in that light. Before that notice, all the rents due from the tenants must be considered as due to the mortgagor, and to have been received by the defendant for him; and he is, therefore, accountable to the assignees. But, secondly, as to the rents which accrued due after the notice. It is true, that the mortgagee might have brought an ejectment, and have evicted the tenants, but he has not done so. If the mortgagor, therefore, had sued for the rents, the tenants could not have pleaded an eviction by the mortgagee, but merely that the mortgagor had no title. That clearly would have been a bad plea, *Alchorne v. Gomme* (c). [*Parke J.* They might have pleaded pay-

(a) *Doug.* 279.(b) *Ibid.* 21.(c) 2 *Bing.* 54.

ment of rent to the mortgagee after he had given them notice of his rights, and of his intention to enforce them if necessary. The tenants were not bound to withhold the rent until the mortgagee commenced an ejectment or prosecuted it to judgment. Payment of rent to the party having the legal title to the land, after a threat by him (in case of non-payment) to enforce his rights by law, is a good payment.]

1829.

For
against
Bills.

BAYLEY J. I have no doubt, that in point of law, a tenant who comes into possession under a demise from a mortgagor, after a mortgage executed by him, may consider the mortgagor his landlord so long as the mortgagee allows the mortgagor to continue in possession and receive the rents; and that payment of the rents by the tenant to the mortgagor, without any notice of the mortgage, is a valid payment. But the mortgagee, by giving notice of the mortgage to the tenant, may thereby make him his tenant, and entitle himself to receive the rents. It is undoubtedly a well established rule, that a lessee cannot dispute the title of his lessor at the time of the lease, but he is at full liberty to shew that the lessor's title has been put an end to. There is another rule of law, viz. that the mortgagor cannot dispute the title of the mortgagee. When the mortgagor occupies the premises, he holds under the mortgagee, who may put an end to the rights of the mortgagor. *Keech v. Hall* (a) shews, that where a lease has been granted by a mortgagor *after* the mortgage, and the mortgagee has suffered the mortgagor to continue in possession, though the lessee is not entitled to

(a) *Doug.* 21.

1829.

POPE
against
BACS.

say that the mortgagor never had any interest in the premises, he may say that he had a defeasible title, and that that title has since been defeated, or in other words, that he had such a title only as a mortgagor may have. It is clear, that the mortgagee in this case might have maintained an ejectment against the tenant of the mortgagor, and evicted him, and that such eviction by title paramount would be an answer to an action for rent; and that being so, it seems to follow that it was not necessary for him to go through the form of an ejectment if the tenants were willing to attorn and pay their rents to him. It was sufficient for him to do any act which put an end to the title of the mortgagor. Here the mortgagee, by giving notice of the mortgage to the tenants, has put an end to the right of the mortgagor to receive the rents. At common law, the attornment of the tenant would have been necessary to entitle the mortgagee to the rents; but the effect of the statute 4 *Anne*, c. 16. ss. 9, 10., is to place a tenant, as soon as he has notice of the mortgage-deed, in the same situation as if he had attorned to the mortgagee, with this exception, that he is not to be prejudiced by any act done by him as holding under the grantor, until he has had notice of the mortgage-deed. That being so, as the attornment at common law would have related back to the time of the grant, it follows that all the rents due from the tenant (not actually paid over to the mortgagor), belong of right to the mortgagee. Here the defendant claims to retain the rents which were actually due from the tenants at the time when they had notice of the mortgage, as well as rents which became due afterwards. As the tenants were bound by law (after notice) to pay to the mortgagee all the rents not actually paid over to the mortgagor, I think

think the defendant is entitled to retain those rents in respect of which he made payments to the mortgagees, and that he is entitled also to retain the other sums, in order to meet the arrears of interest which will next become due. He held those sums for the persons entitled by law to receive them, and the mortgagees are those persons. The plaintiffs therefore are not entitled to recover.

1829.

Porn
against
Bragg.

LITLEDALE J. I am of the same opinion. *Moss v. Gallimore* (a) is not precisely in point, because, there the lease under which the tenant held was granted prior to the mortgage. We must consider in this case how the law is, where the lease under which the tenant holds has been granted by the mortgagor subsequently to the mortgage. It has been said that a mortgagor who is in actual occupation, is in the nature of a tenant at will, or by sufferance to the mortgagee. He bears a greater resemblance to a tenant by sufferance than to a tenant at will, but it is wholly immaterial in this case whether he be one or the other. There is at all events a peculiar relation existing between the mortgagor and mortgagee. When a mortgage is executed, the mortgagee becomes the legal owner of the land, is entitled to immediate possession, or to the rents and profits. Any lease granted by the mortgagor (after the mortgage), is void as against the mortgagee. In *Keech v. Hall* (b), Lord Mansfield says, "When the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises at will in the strictest sense; and, therefore, no notice is ever given to him to quit, and he

(a) *Doug.* 278.(b) *Ibid.* 22.

1829.

Pork
against
Bills.

is not even entitled to reap the crop as other tenants at will are, because all is liable to the debt, on payment of which the mortgagee's title ceases. The mortgagor has no power express or implied to let leases not subject to every circumstance of the mortgage." The mortgagor, therefore, has no right to do any thing without the consent of the mortgagee. And the latter, although he may suffer the mortgagor to receive the rents for a time, may give notice to the several tenants not to pay them to the mortgagor, and thereby determine the authority of the latter to receive them, and any tenant who pays rent to him after that notice does so at his peril. It is said that this may be true as to future rents, but that it is not so as to by-gone rents. The same principle, however, applies to both. The mortgagee cannot, indeed, distrain or maintain any action for the by-gone rents which accrued due before he gave notice to the tenants, because, before that time, there was no privity between him and the tenants. But the notice by force of stat. 4 Ann. c. 16. operates as an attornment of the tenants, and when they attorn they become tenants to the mortgagee, and at common law that attornment would have related back to the grant so as to entitle the mortgagee to all the rents from the time when the deed was executed. A new tenancy is then created as between mortgagor and mortgagee, the latter becomes entitled to all the by-gone rents. All those who come in under the mortgagor are, strictly speaking, trespassers. In ejectment the plaintiff might declare on the demise of the mortgagee, and the accruing rents being in the nature of mesne profits, might be recovered by the mortgagee from the day when he gave notice of the mortgage to the tenants. And if the mortgagee might, after bringing an ejectment,

recover

recover those rents in an action for mesne profits; it is perfectly clear that he is entitled at law to receive them without bringing any ejectment. Here the defendant received them from the tenants, and had not paid them over to the mortgagor when the tenants had notice of the mortgage from the mortgagee. The mortgagee is not entitled to recover *qua* mesne profits, the by-gone rents actually paid over to the mortgagor, because he suffered the mortgagor to remain in possession and to receive the rents, but as to those not actually paid over he is entitled to recover them. As to them he may say, that the tenant is not justified in paying them over to the mortgagor, and that the latter has no authority to receive them. And as to the accruing rents, there has been in this case that which is equivalent to an eviction by title paramount before those rents became due, and that will be an answer to any action for rent by the mortgagor. It seems to me, therefore, that the mortgagees, by giving notice of the mortgages to the tenants, entitled themselves to receive the by-gone as well as the future rents. The rule for entering a verdict for the plaintiff must, therefore, be discharged.

PARKE J. I agree that this rule ought to be discharged. The question presented for our consideration is, Whether the plaintiffs ought to recover rents due before, and since the notice by the mortgagees: the defendant having either received, or being, as tenant, liable to pay such rents to some person. It is contended, that the defence amounts to a plea of *nil habuit in tenementis*, of which the defendant cannot avail himself as to the house of which he is tenant, nor can he be in a better

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Pore
against
Bices.

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 PORE
 against
 Briggs.

better situation as to the others. It is undoubtedly true that a plea of nil habuit in tenementis is no answer to an action against the tenant at the suit of his landlord; but eviction by title paramount is a good plea to an action for rent which accrued due subsequently to such eviction, and the defence in this case bears more resemblance to the latter plea. That which has been done by the mortgagee is rather in the nature of an eviction by title paramount. *Sapsford v. Fletcher* (a), and *Taylor v. Zamira* (b), are cases very like the present. In the first-mentioned case it was held, that it was a good plea to an action for rent that before the rent became due the ground landlord *threatened* to distrain for rent due from the lessor, and that the under-tenant paid him the rent to save his own goods. This was considered to be a payment by compulsion, though there was no actual distress. In *Taylor v. Zamira* it was held, that to an avowry for rent the plaintiff in replevin may plead payment of an annuity secured out of the lands demised previously to the demise, for the arrears of which the grantee had threatened to distrain. Gibbs C. J. there seems to have considered what had taken place as equivalent to an eviction. He says, "In every plea of eviction there is an averment that the lessor had not a perfect title when he demised, but that fact alone will not suffice; to constitute a plea, to it must be added the fact that the lessee was in consequence *evicted*; the whole is a defence. The plaintiff's counsel argues that because nil habuit in tenementis alone is not a defence, therefore it

(a) 4 T. R. 511.

(b) 6 Tunt. 527.

cannot be part of any other defence. The question is, Whether the fact that the tenant was called on by the annuitant, under a threat of distress, to pay off the arrears of the annuity, and did pay them off accordingly, being added to the other fact of the lessor's defect of title, be not a good plea." The Court decided that it was a good plea. Upon the same principle, in this case the fact that the tenant was called on by the mortgagee to pay the interest of the mortgage under a threat that he would put the law in force, and did pay it accordingly, being added to the other fact of the mortgagor's defect of title, seems to be a good plea to an action by the mortgagor for so much rent as the tenant was bound so to apply; the fact of the mortgagee being entitled to the possession would not. Now the tenant was bound to apply all the rents in arrear at the time of the notice, as well as that due afterwards (as long as the interest was unpaid), for by an ejectment against him, and a subsequent action for mesne profits, the mortgagees might certainly have recovered these rents from the tenants; and it cannot be necessary, and it would be dangerous to the interests of the mortgagees and tenants, to hold that the former are bound to take those expensive steps, when the latter is willing to pay without. A complete and satisfactory answer to this action is, however, to be found in the peculiar relation of mortgagor and mortgagee. In *Moss v. Gallimore* (a) Lord Mansfield says, "A mortgagor is not, strictly speaking, a tenant at will to the mortgagee, for he is not to pay him rent. He is so only quodam modo. Nothing is more apt to confound than a simile. He is like a

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 Port
against
Bices.
(a) *Doug.* 279.

1829.

FOR
against
Biggs.

tenant at will. The mortgagor receives the rent by a tacit agreement with the mortgagee; but the mortgagee may put an end to this agreement when he pleases." The mortgagor may be considered as acting in the nature of a bailiff, or agent, for the mortgagee: his receipt of rent will, therefore, be good until the mortgagee interferes, and he may recover on the contracts he has himself entered into in his own name with the tenant. But where the mortgagee determines the implied authority by a notice to the tenants to pay their rents to him, the mortgagor can no longer receive or recover any unpaid rent, whether already due or not. On this ground I am of opinion that this action, which is in effect brought by the mortgagor, cannot be supported. Since the notice, the plaintiffs have ceased to have a right to receive any of the rents. The case of *Alchorne v. Gomme* (a) is an authority the other way; but the pleadings in that case do not perhaps sufficiently raise the question now under consideration; and by the form of those pleadings the attention of the Court seems to have been principally directed to the consideration of the effect of the alleged attornment by the tenant to the mortgagee, which, in the view I have taken of the subject in this case, appears to me to be immaterial, the notice given by the mortgagee being sufficient to determine the authority of the mortgagor, and to entitle the mortgagee to receive, whether the tenant attorned or not. I think, therefore, the mortgagor was not, and his assignees, the plaintiffs, are not, entitled to any unpaid rents (at least until the interest due to the mortgagee is paid), and the tenant may

(a) 2 Bing. 54.

keep the accruing rent for the purpose of paying the accruing interest, and consequently the plaintiffs cannot recover.

1829.

Porz
against
Biggs.

Rule for entering a verdict for the plaintiffs discharged.

POULTON *against* LATTIMORE.

ASSUMPSIT for goods sold and delivered. Plea, general issue. At the trial before *Garrow* B., at the Summer assizes for the county of *Hertford*, 1828, it appeared that the action was brought to recover the price of eight quarters of cinq foin seed sold by the plaintiff to the defendant at 3*l.* per quarter, and warranted to be good new growing seed. The defence was, that it did not correspond with the warranty. It was proved that soon after the seed had been purchased by the defendant, it had been examined and tasted by a person of skill, and that he had declared it not to be good growing seed; that the defendant did not communicate this to the plaintiff or return the seed; but, on the contrary, sowed part, and sold the residue to two individuals, who were called as witnesses, and they stated that the seed had proved wholly unproductive, and was not worth any thing, and that they neither had paid nor would pay for it. It was insisted, on the part of the plaintiff, that as the defendant had not returned the seed, but had sown part of it, and had sold the residue to two persons who had sown it, he had adopted the contract in part; that he could not adopt it in part by keeping the seed, and reject it in part by refusing to pay the stipulated price; but

By a contract for the sale of cinq foin seed, the vendor warranted it to be good new growing seed. Soon after the sale, the buyer was told that it did not correspond with the warranty; and he afterwards sowed part, and sold the residue: Held, that, in answer to an action by the seller to recover the price of the seed, it was competent to the buyer to shew that it did not correspond with the warranty.

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but that having adopted it in part, he was bound to adopt it altogether, and therefore to pay the stipulated price; and that being so, that it was not competent to the defendant to insist on the breach of warranty as a defence to this action. The learned Judge received the evidence, but reserved liberty to the plaintiff, in case the verdict of the jury should be against him, to move to enter a verdict in his favour, if the Court should be of opinion that the breach of warranty was no defence to the action; and he directed the jury to find for the defendant if upon the evidence they were of opinion that the seed did not correspond with the warranty. The jury having found for the defendant, a rule nisi was obtained in last *Michaelmas* term by *Brodrick* for entering a verdict for the plaintiff for the value of the seed, against which

Andrews Serjt. now shewed cause. The vendor having expressly warranted the seed to be good new growing seed, the buyer was entitled to prove the breach of the warranty in diminution of damages, although he did not rescind the contract by returning the seed. It is true, that if goods be sold at a specific price without a warranty, and the goods delivered do not correspond in value with those contracted for, the vendee by returning the goods, or giving notice to the vendor to take them back, may rescind the contract in toto. And if in such case the vendee keep the goods, he must pay the stipulated price; he must either wholly adopt or wholly rescind the contract; he cannot adopt it in part by keeping the goods under the contract, and reject it in part by refusing to pay the stipulated price. But where there is an express warranty by the seller that the goods are of
a specific

a specific quality, and he brings an action to recover the value of them, the vendee may, in answer to the action, prove the breach of the warranty in diminution of damages, although a specific price has been agreed upon, and although he has not rescinded the contract in toto by returning the goods. From the very nature of the contract of warranty the vendee has a right to keep the goods, and to recover damages for a breach of the warranty. He may either rescind the contract in toto by returning the goods speedily, and while they remain in the same state, and refuse to pay the price, or recover it in case it has been paid, or he may retain the goods, and recover the difference between the real value and their value as warranted. And if that be so, it is reasonable, when an action is brought by the seller for the price, that the buyer should be at liberty to shew that the goods do not correspond with the warranty. Here, from the nature of the warranty, the buyer was entitled to sow the seed, to try whether it was good growing seed. He was not bound to trust to the assertion of an individual that it was not. Then, as to the point that the plaintiff is entitled to recover something, there was evidence to shew that the seed was of no value whatever. Besides, that point was not made at the trial.

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Brodrick and Ryland contra. The buyer knew the seed to be bad before it was sown. He was, therefore, bound, as soon as the breach of warranty was discovered, and whilst the goods remained in the same state, and their value could be ascertained, to return them, or give notice of his objection to it. In *Grimaldi v. White* (a)

(a) 4 *Exp. N. P. C.* 85.

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the party had agreed to purchase, at a stipulated price, a painting, which was to be executed conformably to a specimen exhibited. On delivery it was found of inferior execution, but the buyer did not return it; and it was held that he could not, in an action for goods sold, set up the inferiority of it to the specimen, because he should have returned it, and so have rescinded the contract. In *Fisher v. Samuda* (a) it was held, that as soon as the purchaser of goods discovers that they do not answer the order given for them, he ought to return them to the vendor, or send him notice to take them back; and if he does neither, he cannot afterwards maintain an action on the ground of the article being quite unfit for the purposes for which it was ordered. In *Groning v. Mendham* (b) the action was brought for the price of clover seed sold by sample; the defence was, that the seed did not accord with the sample. Lord *Ellenborough* held, that before the defendant could go into such a defence he must prove that he gave notice of his objection to the seller, and offered to return the seed. In *Hopkins v. Appleby* (c) the action was for goods sold and delivered. The defendant, who was a soap-maker, bought of the plaintiff eight sarrands of *Spanish* barilla, warranted to be of the best quality. Immediately after the arrival of the barilla the defendants mixed the contents of the eight sarrands together, and proceeded to use it for the manufacture of soap. It appeared upon trial that the barilla was of so inferior a quantity that it required nearly double the usual quantity in order to complete the process of soapmaking. They continued nevertheless to use it, without making any complaint, and in fact

(a) 1 *Compb.* 190.(b) 1 *Stark.* 257.(c) 1 *Stark.* 477.

made no remonstrance until the whole of the barilla had been consumed in eight successive boilings. The defence was, that the barilla was not of the quality stipulated for, and the defendant paid into court as much as he contended it was really worth; and it was insisted that, since the article was warranted, he was not bound to return it upon discovering its inferiority, or even to give notice of the defect. But Lord *Ellenborough* ruled that as the vendee had given no notice to the vendor of any defect in the article, and had deprived him of the means of proving the value of the article by proper testimony, the vendee could not set up the alleged defect of the article as a defence. That case is precisely in point. So in *Milner v. Tucker* (b) a party contracted to supply a chandelier sufficient to light a room of given dimensions, which the buyer kept for six months, and then returned; it was held that he was bound to pay for it, though not according to the contract.

1829.

 FOULTON
against
 LATTIMORE.

BAYLEY J. It seems to me that it was competent to the defendant to shew that the seed did not correspond with the warranty. The seller warranted the seed to be good new growing seed. There was evidence to shew, and the jury have found, that it was not good growing seed. It appears, however, that after the sale a competent judge tasted the seed, and told the defendant that it was not good growing seed. The defendant did not then give notice to the plaintiff that it was defective in quality, but he proceeded to sow part, and to sell the residue. It is insisted that he ought then to have returned the seed, or to have given notice to the

(a) 1 Car. N. P. C. 15.

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seller of its defective quality. As the plaintiff, however, gave an express warranty that it was good growing seed, I think the defendant might, without returning it, shew it did not correspond with the warranty. Besides, the buyer was not bound to trust the assertions of third parties, and to return the seed, and treat it as if it was bad seed. He was at liberty to try the seed and to sow it. Probably without sowing it, the fact could not be ascertained whether it would ultimately produce a good crop. From the nature of the article, and of the contract of warranty, I think the vendee was not bound to return the seed without using it; that by keeping it, he has not precluded himself either from bringing an action for breach of the warranty, or from insisting on such breach in this action, in order to shew that the seed was of less value than the seller represented it to be. But it is said, that although the warranty was not complied with, yet, as the defendant used part, and disposed of the residue, it must have been of some value to him, and therefore that the plaintiff was entitled to recover something. But there was no evidence to go to the jury that the seed was of any value to any of the parties who sowed it; besides, the only question made at the trial was, whether it corresponded with the warranty. The judge was not called upon to put the other question to the jury; if he had, they probably would have come to the conclusion, that the seed was not of any value. The rule must be discharged.

LITTTLEDALE J. It seems to me, that it was competent to the defendant, in answer to this action, which is brought by the plaintiff to recover the price or value of the seed, to shew that it did not correspond with the warranty

warranty. It is said, that the buyer cannot insist on that as a defence, because he neither returned the seed to the seller, nor gave any notice to him that it was defective in quality. I am of opinion, that where goods are warranted, the vendee is entitled, although he do not return them to the vendor, or give notice of their defective quality, to bring an action for breach of the warranty; or if an action be brought against him by the vendor for the price, to prove the breach of the warranty, either in diminution of damages, or in answer to the action, if the goods be of no value. In *Fielder v. Starkin* (a), a horse had been sold, warranted sound. It was proved to have been unsound at the time of the sale. Soon after the sale, the defendant discovered him to be unsound, but kept him three months after the discovery. It was decided that the seller was liable to an action on the warranty, although the purchaser had not returned the horse, or given notice of the unsoundness, on the ground that there had been a breach of the contract on the part of the seller. The not giving notice indeed, raises a strong presumption that the article at the time of the sale corresponded with the warranty, and calls for strict proof of breach of the warranty. But if that be clearly established, the seller will be liable in an action brought for breach of his contract, notwithstanding any length of time which may have elapsed since the sale. And if that be so, it is reasonable and just, when an action is brought by the seller to recover the price or value of the goods, that the buyer should be at liberty to shew the breach of the warranty in defence to the action. Then the only question is, was the seller

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entitled to recover any thing. There may be cases where a buyer may keep goods, which though they do not correspond with the warranty, may be worth something, and the seller may be entitled to recover. Suppose one hundred bushels of seed had been sold, and warranted good, and one bushel turned out to be bad, the seller would be entitled to recover the value of the ninety-nine. The question in this case is, was the article worth any thing? And secondly, if it was, should the learned judge have left the question of value to the jury. His attention was not called to that point, and if it had, taking the whole evidence together, I think that the jury would have found that the seed was worth nothing.

PARKE J. I am of opinion that there ought not to be a new trial in this case. The plaintiff might have shaped his case in either of two ways. He might have claimed to recover the price stipulated in the contract made between the parties, but then he could not have recovered that price, without shewing that the warranty was complied with. But if, in order to recover the contract price, he had attempted to shew that the warranty was complied with, it would, undoubtedly, have been competent to the defendant to give evidence to negative that fact. The plaintiff, instead of relying on the contract, might, however, claim to recover on the quantum valebat so much as the seed was worth, and prove by parol the actual value of the seed. In answer to that case, it would be competent to the defendant to shew by the contract, that he purchased the seed as good growing seed, to use for the purpose of sowing; and that it, not being good growing seed, was of little or

no

no value to him. Then it is said that it must have been of some value, and therefore that the plaintiff is entitled to a verdict. I am not satisfied that the case was presented to the judge so as to raise this question. The learned judge does not state in his report, that that was made a point at the trial; and if it had been left to the jury to find for the plaintiff if they thought the seed of any value, I think, that, upon the evidence stated in the report, they would probably have found for the defendant.

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Rule discharged.

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REPLEVIN for taking plaintiff's cattle, goods, &c.

Cognizance by defendant, as the bailiff of *John Alsop*, for half a year's rent of a house and other premises, which it was alleged the plaintiff held as tenant thereof to the said *John Alsop*, by virtue of a demise

Testator being seized in fee of lands in which he had a beneficial interest, and also of other lands, as mortgagee, after giving a portion of his

real estate, and charging his whole real estate with the payment of several annuities and pecuniary legacies, devised all his lands, &c. unto trustees, their heirs, and assigns, until *W. E. S.* should attain his age of twenty one years, or in case of his death before twenty-one without leaving issue male, until his sister *M.* should attain her age of twenty-one years, in trust, to dispose of the rents and profits as thereafter declared; and as soon as *W. E. S.* attained the age of twenty-one years, testator devised to him all his lands, &c. for life, remainder to trustees to preserve contingent remainders, in trust to permit *W. E. S.* to receive the rents for life, and after his decease, to his first and other sons in strict settlement, and in default of issue, to *M.* his sister for life, with similar limitations to her first and other sons; provided *W. E. S.*, or *M.*, or her future husband, should assume the surname of the testator.

By the residuary clause testator bequeathed all his stock in trade, cotton-mill, machinery, cupola-furnace, mineral-tools, implements, and utensils, ready money, and securities for money, debts, personal estate, and effects of what nature or kind soever, to his executors, upon trust that they, or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor, should sell the same, and invest the produce in the purchase of freehold estates: Held, that the legal estate in the mortgaged property did not pass to the executors under the clause first above mentioned; because, although the words there used were sufficient to pass such property, the testator had subjected the property thereby devised to limitations inapplicable to mortgaged property: Held, secondly, that it did not pass under the residuary clause; because the words securities for money, as there used, were not sufficient to pass such property.

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reserving an annual rent of 398*l*. Plea, non tennit. At the trial before *Park J.*, at the Spring assizes for the county of *Hereford*, 1828, the following appeared to be the facts of the case: — *John Alsop* was the surviving executor of *Peter Nightingale*. The latter being mortgagee in fee of (among other lands and hereditaments) the dwelling-house, &c. mentioned in the pleadings (by virtue of indentures of lease and release of the 31st of *December* 1802 and the 1st of *January* 1803), died on the 25th of *June* 1803, having first made and published his will, dated the 6th of *May* 1803, duly attested to pass real estates. On the 8th of *August* 1826, *Alsop* gave the plaintiff notice in writing of the mortgage, and thereby required him to pay the rent due and to accrue due, to him *Alsop*. By his will *Peter Nightingale*, after appointing *John Toplis*, *Thomas Saxton*, and *John Alsop* his executors, devised a portion of his real estate to *Mary Brown*, habendum until *W. E. Shore* attain his age of twenty-one years; and then, after giving specific portions of his estate to other persons, and having charged his real estates generally with the payment of certain annuities and pecuniary legacies, proceeded as follows: “and subject to the payment of the said several annuities and pecuniary legacies, I give and devise all my manors, farms, messuages, lands, tenements, tithes, hereditaments, and estate (save and except as therein was mentioned), unto the said *John Toplis*, *Thomas Saxton*, and *John Alsop*, their heirs and assigns, until such time as *W. E. Shore* shall attain his age of twenty-one years; or in case of his death before he shall attain that age without leaving issue male lawfully begotten, then until such time as his sister *Mary Shore* shall attain her age of twenty-one years; in trust that they, *J. Toplis*, *T. Saxton*, and
J. Alsop,

J. Alsop, or the survivor of them, or the *heirs* or assigns of such survivor, shall apply and dispose of the rents and profits arising from my said real estates hereinbefore devised to them, upon such trusts and for the same purposes as hereinafter expressed concerning the same, and also of and concerning such part of my personal estate as is hereinbefore given to them, my said trustees. But it is nevertheless my will that my said trustees, or the survivor of them, or the heirs or assigns of such survivor, shall have a discretionary power of selling and disposing of such parts of my said real estates as are hereinafter directed to be sold. And when and so soon as the said *W. E. Shore* shall have attained his age of twenty-one years, then I give and devise unto him and his assigns all and singular my said manors, messuages, lands, tenements, hereditaments, and real estates, save and except as hereinbefore mentioned; habendum for life; and from and after the determination of that estate by forfeiture or otherwise, to trustees to preserve contingent remainders; but to permit *W. E. Shore* to receive the rents for his life, and after his decease to his first and other sons in strict settlement; and in default of issue, to *Mary Shore* for life, with similar limitation to her first and other sons, provided that *W. E. Shore* and *Mary Shore*, and the person with whom she might intermarry, when he, she, or they should by virtue of the devise and limitations become entitled to the aforesaid lands, &c. should assume and take the surname of *Nightingale* only. There was a power to the tenants for life to grant leases for twenty-one years. Then came the following clause: — Also I give and bequeath all my stock in trade, cotton-mill, machinery, copper-

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cupola-furnace, mineral-tools, implements, and utensils, ready money, and *securities for money*, debts, personal estate and effects of what nature and kind soever and wheresoever (not hereinbefore specifically bequeathed), unto the said *John Toplis*, *Thomas Saxton*, and *John Alsop*, *their executors, administrators, and assigns*, upon the trusts and to and for the several intents and purposes hereinafter expressed and declared of and concerning the same respectively; that is to say, upon trust that they the said *J. Toplis*, *T. Saxton*, and *J. Alsop*, or the survivor of them, or the *heirs*, executors, administrators, or assigns respectively of such survivor, do and shall as soon as conveniently may be after my decease sell and dispose of my said stock in trade, cotton-mill, machinery, cupola-furnace, mineral-tools, implements, and utensils, personal estate and effects, and collect in and receive all such sum and sums of money as shall be due and owing to me at the time of my death, and lay out and invest the same, and also the rents and profits of my real estates during the respective minorities of the said *W. E. Shore* and his said sister, and likewise the purchase-monies arising from the sales which they, my said trustees, are hereinbefore directed or empowered to make from time to time as the same sum and sums of money shall respectively be got in and received, in the purchase of freehold lands, tenements, or hereditaments in *England* or in the United States of *America*, and convey, settle, and assure, the said lands, tenements, or hereditaments, so to be purchased as aforesaid; or cause and procure the same to be conveyed, settled, and assured to such uses, and for such estates, and with and subject to such powers and provisoes

provisoes as are hereinbefore limited, created, and expressed, of and concerning my said manors, messuages, farms, lands, tenements, tithes, hereditaments, and real estates, hereinbefore given and devised to these my said trustees, their heirs and assigns, for the term or time and upon the trusts aforesaid, other than and except the power hereinbefore given to them, my said trustees, of making sale of part of my real estates, or as near thereto as the deaths of persons and other circumstances will then admit of. The learned judge was of opinion, that the legal estate in the mortgaged premises vested in the executors of the testator, by virtue of that clause in the will whereby he devised all his manors, farm, lands, &c., to them. A verdict having been found for the defendant in replevin, *Russell* Serjt. obtained a rule nisi for a new trial, on the ground, first, that if the executors took the legal estate by that clause, their interest must have expired, inasmuch as they were to hold the estate only until *W. Shore*, or his sister, (both of whom were in esse in 1802) attained the age of twenty-one; and secondly, that it was quite clear the testator could not have intended to pass the legal estate in the land mortgaged to him, because he had subjected the property devised by that clause, to the payment of debts and legacies, and to limitations, to which he could not subject mortgaged land.

Campbell and *Talfourd*, at the sittings in banc after *Michaelmas* term, shewed cause. The cognizance undoubtedly cannot be supported under that clause of the will which was relied upon at the trial, for the reasons assigned when the rule was obtained. But, under the residuary

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residuary clause, as expounded by other parts of the will, and with reference to its general object, the legal estate in the mortgaged premises passed to the executors, of whom *Alsop* was survivor. By that clause, the testator inter alia bequeathed *his securities for money* to his executors, upon the trust that they or the survivor of them, or the *heirs*, executors, administrators, or assigns, of such survivor, should sell. The question as to what words in a will will pass a legal estate in mortgaged premises, has been the subject of frequent consideration in courts of equity. All the cases upon the subject were reviewed by Lord *Eldon*, in *Lord Braybroke v. Inskip* (a), and he there decided, that trust and mortgaged estates will pass under general words in a will passing other estates, unless a contrary intention can be collected from the testator's expressions, or from purposes or limitations to which he has subjected the lands so devised. The question then is, whether the words "securities for money" are sufficiently large to pass the land, which was the security for the money lent on mortgage; for if they be, the legal estate will pass, unless a contrary intention appear on the face of the will. The words "securities for money," are sufficiently large to show an intention to pass the legal estate in the land of which the testator was seised in fee, as mortgagee. In *Ex parte Morgan* (b), Lord *Eldon*, when speaking of a will, by which a testator devised to trustees, their heirs and assigns for ever, all such real estates as were then vested in him by *way of mortgage*, the better to enable them and the survivor, and the executors of the survivor, to get in and receive

(a) 8 Ves. 417.

(b) 10 Ves. 101.

the principal monies and interest, intimated an opinion that by that will the legal estate of the mortgagee passed to the trustees; *Crips v. Grysil* (a) is an express authority to shew that under the words, "all my mortgages," the lands will pass. There the testator gave to *Robert Key* "all his goods, monies, bills or bonds, mortgages or specialties for money," and made him his executor; and it was held upon special verdict, that under the words, "all my mortgages," the devisee took lands mortgaged in fee to the testator. In *Martin v. Mowlin* (b), Lord *Mansfield* expressly lays it down that a mortgage is a charge upon the land, and that whatever will give the money will carry the estate in the land along with it to every purpose, and that the estate in the land is the same thing as the money due upon it. In *Silberschild v. Schiott* (c), Sir *William Grant* said, there was no doubt that a gift of the money would carry the mortgagee's interest in the land on which it was secured. These authorities shew, therefore, that the word "mortgages," in the will of a mortgagee in fee, is sufficient per se to pass his estate in the land; and if that be so, it will pass by the words "securities for money," which in the will of such a person are synonymous with the word "mortgages." No contrary intention is to be collected from other expressions in the will, or from any purposes or limitations to which the testator has subjected the property (mentioned in this devise). He has not subjected it to the payment of debts, legacies, annuities, or any other charge, as in *Roe v. Read* (d), *Wilkinson v. Merryland* (e), and *Ex parte Morgan* (f)

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(a) *Cro. Car.* 37.(b) 2 *Burr.* 969.(c) 5 *Ves. & Bea.* 49.(d) 8 *T. R.* 118.(e) *Cro. Car.* 447.(f) 10 *Ves.* 101.

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nor to any limitation or provision to which it cannot be supposed he intended to subject property not beneficially his own. In the numerous cases relating to the subject in courts of equity, the general principle that the intention of the testator shall be effectuated, was not excluded; but the struggle was as to the application of that principle, whether it lay on the party seeking to give the more extended effect to general words, to sustain that extended effect by reference to other parts of the will, or whether the burthen of limiting such general words was cast on the party seeking to establish the more limited construction; but whenever the intention was shewn *aliunde*, the question was at an end; and it was decided by Lord *Eldon* in Lord *Braybrooke v. Inskip*, that such burthen lay on the party seeking to limit general words. Now here, if the intention were to prevail, can it be doubted, that when the testator made the same parties both trustees and executors, and directed the outstanding debts due to him to be called in and invested in land, he intended to clothe those parties with all the powers which might be necessary to the fulfilment of their trust, and to enable them to distrain, eject, or foreclose, as well as to bring actions of covenant or debt on the mortgage-deeds? Such intention is also evidenced by the word "heirs" in the residuary clause, which, though not contained in the limitation itself, but in the subsequent direction, shews that the legal estate was within the contemplation of the testator, when he used the words "securities for money." If then the intention be clear, the words are sufficient to pass the reversion, and the cognizance under *Alsop* is supported.

Russell

Russell Serjt. and E. V. Williams, contra.

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It is important to consider the nature of the interest of a mortgagee in the land mortgaged. He has not any beneficial interest but a bare trust. There is no difference in this respect between the legal estate of a mortgagee in fee, and that of a bare naked trustee under a marriage settlement; they have been considered in all the cases bearing on the subject as having the same kind of interest in the land. Lord *Hardwicke*, in *Casborne v. Scarfe* (a), says, "It is certain the mortgagee is not barely a trustee to the mortgagor, but to some purpose, viz., with regard to the inheritance he certainly is till a foreclosure." This being the nature of the mortgagee's estate, the question in this case is, whether the mortgagee, being a bare trustee for the mortgagor, had any intention of devising his bare legal trust estate in the mortgaged land. The testator, who appears (on the face of the will) to have been a cotton manufacturer, was, probably, in total ignorance that he had any such estate. He would consider his mortgage as entitling him to his money, but would have no idea that he was a trustee of the inheritance for the mortgagor. The question then is, whether there are any technical words in the will, which will compel the court to hold that the legal estate in the mortgaged land passed to the devisee. It is insisted, that that estate passed by the words "securities for money:" those words occur after the words "tools, utensils, ready money," and immediately before the words "personal estate." The rule *noscitur a sociis* applies; and construing these words according to that rule, they will refer exclusively to bills, bonds, or notes. The word estate, when coupled with particular

(a) 1 Atk. 606.

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heir of the surviving trustee is directed to get in the securities for money; must not effect be given to that word?] It would be going too far, to hold that the real estate passed, merely because the word "heir" is improperly introduced into a technical part of the will; besides, the bequest is to the trustees, their executors, administrators, and assigns; the word "heir" is introduced in a subsequent part of the clause. That word ought not to induce the Court to give the clause a construction inconsistent with the other parts of the will. In *Sylvester v. Jarman* (a), the testator (a mortgagee) devised to J. B., and his heirs, all the rest and residue of his freehold estates, leasehold and copyhold estates, which he might be seised of at the time of his decease, either in possession or reversion, together with all his goods and chattels, monies, bonds, mortgages, and debts, which might be owing to him at the time of his decease, *subject to the payment of debts, legacies, annuities, and funeral expences*, and appointed J. B. executor of his will; and it was held that he had *not* thereby devised the legal estate in the mortgaged premises, and that such legal estate did not vest in J. B., but descended to the heir at law of the testator. [Bayley J. That case proceeded on this principle; there the words of the devise per se would have been sufficient to have carried the legal estate in the mortgaged premises; yet, those being qualified by other words, subjecting the property devised to payment of debts, which was a purpose to which the legal estate of the mortgagee was not applicable, shewed that it was not the intention of the testator that that should pass.]

(a) 10 Price, 76.

In *Ex parte Horsfall* (a), *L. Horsfall*, a mortgagee in fee, after directing the payment of his debts, funeral and testamentary expences, devised certain hereditaments and lands therein particularly described, (not comprehending the mortgaged premises) and as to all the rest and remainder of and in, all and singular the property, estate, and effects, which he should be possessed of or entitled to, or over which he should have a disposing power at the time of his decease, of what nature or kind soever the same might be, he bequeathed to trustees. The master having reported that the legal estate passed by the residuary clause to the trustees; *Alexander C. B.*, said, it was clear, according to all the authorities, that the legal estate in the mortgaged land, did *not* pass by the general devise contained in the will, but descended to the heir at law. These authorities establish, that a legal trust estate, perfectly distinct from the beneficial interest in the mortgage, will not pass by general words applicable to personal estate in a will, unless it be expressly pointed at by the testator, so as to shew that he was conscious of his real estate in the mortgaged premises, and intended to pass it.

Cur. adv. vult.

BAYLEY J. now delivered the judgment of the court. This was an action of replevin, and the defendant made cognizance under one *Alsop*, who was the survivor of three trustees mentioned in the will of *P. Nightingale*, and the question was, whether the property in question, which was mortgage property, passed under that will. There were

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(a) 1 *McLeland & Youngs*, 222.

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two clauses in the will under which it was (at different times) contended that the property passed. One which conveyed the property, which was the subject of that clause, contained words sufficiently large to have included the property in question, but it conveyed that property afterwards to trustees for the use of certain persons in strict settlement, and with a great variety of peculiar limitations which were not properly applicable to mortgage property, but more applicable to property of which the party making the disposition was the sole and exclusive owner, and upon the principle of the cases which have been decided on the subject of devises of mortgage property, we are of opinion that it did not pass under that devise.

There was another clause of the will by which the testator gave all his money, goods, and securities for money. It was insisted, that the mortgage property passed under the words *securities for money*. He gave the property mentioned in that clause to trustees, their executors, administrators, and assigns, upon the trusts thereafter expressed. There were no words of inheritance applicable to the bequest, but there was a word of inheritance applied as to the manner in which the property was to be disposed of. The testator directed that the trustees, or the survivors of them, or the *heirs*, executors, administrators, or assigns, respectively of such survivor, should deal with the property, (to which that part of the will was applicable,) and for some time, the court had a very strong impression upon their minds, that by the use of the word "*heirs*" there, they might, under the general words "*securities for money*," consider the mortgage in fee as passing, for otherwise it was supposed that the word *heirs* would have had

had nothing upon which it could have operated. But on carefully looking at the will, it turns out that the property which had been originally given, (not in that clause) but in an earlier clause of the will, to the trustees, was given to them, their *heirs* and assigns, and they were, during the infancy of particular persons, to appropriate the rents and profits to uses which were specified; and the word "*heirs*," as it appears to us in the latter part of the will, will apply to the controul which the trustees, their heirs and assigns, would have over the property, until some person should come of age, in order to take a beneficial interest under the will in question. It appears to us, therefore, looking at the whole of the will, that from the use of the word "*heirs*" in that part of the will, no inference can be drawn that the testator intended to pass his real estate in the mortgaged premises.

Now if we cannot draw any such inference from the use of the word "*heirs*," then the question depends upon the general devise of money, goods, chattels, securities for money, and other personal estate given to the trustees, their executors, and administrators, and upon looking at those words, it is the opinion of the whole Court that they are insufficient to pass the mortgage property. The general rule with respect to mortgage property, to be collected from *Doe v. Reade* (a), *Lord Braybrooke v. Inskip* (b), and *Sylvester, Bart. v. Jarman* (c), is this: In the first place, there must be words sufficient in order to pass the mortgage property; in the next place the property must not be limited to uses inapplicable to mortgage property. We think the mortgage property did not pass under the

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(a) 8 T. R. 118.

(b) 8 Ves. 417.

(c) 10 Price 76.

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first clause, because there the subject of devise is limited to uses not applicable to mortgage property, and we think that it does not pass under the latter clause, because the words there used are not adequate to the passing of such property. *Crips v. Grysil* was relied upon. The words of the will, as stated in *Cro. Car.* 37., certainly were very similar to those of the will in this case; but, on looking at the record of the special verdict in that case, it appears that there were words in the will going greatly beyond those contained in the report. According to the printed report, *Peter Key* gave *Robert Key* all his goods, monies, bills, or bonds, mortgages, and specialties for monies, and made him his executor. Now, on referring to the record in that case, it turns out that the language of the will, which was an inaccurate will and very short, was this, "In the name of God, Amen. I, *Peter Key*, at this present, blessed be God, whole both in bodye and mynde, and of perfect memorye, doe and make this my last will and testament in manner and form as followeth: the rest of my goods not bequeathed, my money, bills or bonds, mortgages or specialties for money, I doe give unto *Robert Key*, my sonne, and do make him my full and sole executor, yea, and alsoe my heire of this freehoulde." The special verdict states the indenture of mortgage which was a feoffment and mortgage in fee, and it does not appear that the testator had any other property but that freehold estate, of which he could have been considered as making *Robert Key* heir. He afterwards limits that estate to *Robert Key* so long as he shall have heirs male of his body, and if he should cease to have heirs male of his body, then it is limited to another *Robert Key*,

Key, (I take it not his son, but the son of another child of the testator,) to him and his heirs male also. The distinction between this case and *Crips v. Grysil*, and that which prevents its being an authority to shew that the words in the present will are adequate to convey the property in question, is this, that there the testator not only uses the words "mortgages or specialties for money," and makes his legatee executor, but he also makes him heir, "yea, and also my heire of this freehoulde." For these reasons, we are of opinion that that case is not an authority to shew that the words "securities for money," when limited to executors, administrators, and assigns, and when there is nothing else in the will to shew any intention on the part of the testator to pass freehold property, are adequate to pass freehold estate, and consequently that the legal estate in the mortgaged land did not pass to these trustees. The cognizance by which the defendants claim under them cannot, therefore, be supported; and the rule for a new trial must be made

Absolute.

See Renswaine v. Cooper, 6 Mad. 371.

The KING against The Justices of KENT.

CHARLES RITCHIE, a parishioner of *Greenwich*, had been rated to the relief of the poor by a rate made on the 24th of *June* 1828. By a local

act, the management of the parish poor was vested in the churchwardens,

overseers, governors, and directors of the poor; and an appeal to them was given to any person thinking himself aggrieved by any thing to be done by virtue of the act; and if the appellant should be dissatisfied with their determination, then an appeal was given to the quarter sessions. A parishioner having applied, for relief against a rate, to the churchwardens, overseers, governors, and directors, they, at a meeting, resolved to take no further notice of his application: Held, that, as they had not come to any determination on the subject matter of his complaint, the parishioner could not appeal to the quarter sessions, but that he ought to have first applied for a mandamus to compel the churchwardens, overseers, governors, and directors to hear the appeal.

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act, the management of the poor in that parish is vested in the churchwardens, overseers, governors, and directors. On the 14th of *December* 1827, the parishioners in vestry assembled, resolved that the sum of 160*l.* 18*s.* should be paid out of the poor's rate to *Robert Suter*, the then vestry clerk, for services performed by him during the time he held that office, and for which no charge had been theretofore made to the governor and directors of the poor. *Ritchie* objected to the payment. Three of the governors on the 2d of *July* 1828, signed a check, payable to *Suter*, and the same was paid. The defendant considering himself aggrieved, within one month after the signing of such check, namely, on the 16th of *July*, applied for relief, pursuant to the provisions of the local act(a), to the churchwardens,

(a) By s. 63. it is enacted, that if any person shall think himself aggrieved by any rate, or any rule or order, or other matter or thing to be made or done by the said churchwardens, overseers, and governors and directors, by virtue of this act, such person may apply for relief to the said churchwardens, overseers, and governors and directors at any of their meetings, provided that such appeal be made within one calendar month next after payment of such rate shall have been demanded, or next after such rule or order, or other matter or thing, shall have been made or done, and the said churchwardens, overseers, and governors and directors may examine such persons, or any witness, upon oath or affirmation touching the matter of such appeal, and (if they think such person aggrieved) give such relief, or make such order in the matter as to them shall seem meet.

By s. 64. it is further enacted, that if any such person be dissatisfied with the determination of the said churchwardens, overseers, and governors and directors, in regard to any rate complained of, such person shall nevertheless pay the said rate, and after payment of the said rate, but not otherwise, such person may, within three calendar months next after the determination of the said churchwardens, overseers, and governors and directors, appeal as hereinafter provided.

By s. 65. it is further enacted, that it shall be lawful for any person dissatisfied with the determination of the said churchwardens, overseers, and governors and directors in regard to any rate, or any rule or order, or other

wardens, overseers, governors, and directors, of the poor of the parish of *Greenwich*, (at a meeting held on that day) against the poor-rate, on the ground that the payment to *Suter* was illegal. A meeting of the churchwardens, overseers, governors, and directors of the poor, was held on the 24th of *July*, when a resolution was moved, seconded, and carried, that no further notice should be taken of *Ritchie's* application for relief. He being dissatisfied with this resolution, on the 19th of *September* 1828, gave notice of appeal to *E. W. James*, the clerk to the governor and directors, against the said resolution, as being a thing done by them at the said meeting, and entered into a recognizance and caused the appeal to be entered. It was objected at the sessions that the appeal ought to have been against the signing of the check, or the payment of the money. The sessions refused to hear the appeal. A rule nisi had been obtained, for a mandamus to the sessions to enter continuances and hear the appeal.

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Sir *James Scarlett* and *D. Pollock* now shewed cause. The sessions were right in refusing to hear the appeal, because the matter had not been heard or determined by the churchwardens, overseers, governors and directors, they having refused to hear the complaint altogether. That being so, the appellant ought to have applied for a man-

other matter or thing as aforesaid, or for any person who may feel himself aggrieved by any order or conviction of any justice of the peace under this act, to appeal to the justices of the peace at some general session of the peace, or general quarter session of the peace to be holden for the county of *Kent*, within four calendar months next after the determination of the said churchwardens, overseers, and governors and directors, or next after such matter of complaint or appeal shall have arisen.

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damus to compel them to hear the appeal; and, if they had then come to any determination on the subject matter of the complaint, he might, if dissatisfied with that determination, have appealed to the sessions.

Bolland and C. Law contra. The question is, whether the refusal to take any notice of the complaint be or be not a matter or thing done within the meaning of the act of parliament. The appellant applied to the churchwardens, overseers, governors, and directors, for relief against the rate. They in effect refused to grant him any relief. In *Rex v. Tucker (a)*, the magistrates at a special petty sessions had dismissed an application under the 3 G. 4. c. 33. s. 2., not on the merits, but on a mistaken notion of law, and it was held that an appeal lay to the general quarter sessions. There the statute gave jurisdiction to the justices at petty sessions, to hear and determine the complaint brought before them, and then enacted, that if any person should think himself aggrieved by *any thing done* under that act, such person might appeal to the quarter sessions. It was contended that the dismissal of the complaint by the justices at petty sessions, was not a thing done within the meaning of the act of parliament. But the Court were of opinion that it was, and that the sessions ought to have heard the appeal.

LORD TENTERDEN C. J. By the sixty-third section of the act, any person who thinks himself aggrieved by any rate, or any rule or order, or other matter or thing to be made or done by the churchwardens, overseers,

(a) 5 Barn. & Cross, 544.

governors,

governors, and directors, by virtue of the act, may apply for relief to the said churchwardens, overseers, governors, and directors, at any of their meetings, provided the application be made within the time therein specified; and they are empowered to examine witnesses on oath, touching the matter of such appeal, and to give relief.

By section sixty-five, any person dissatisfied with the determination of the said churchwardens, overseers, governors, and directors, may appeal to the general quarter sessions within the time therein specified.

In this case, a rate was made, and a sum of money ordered to be paid out of that rate to *Suter*. *Ritchie* objected to such payment, and applied for relief under the sixty-third section, to the churchwardens, overseers, governors, and directors, assembled at a meeting on the 16th of *July*. They resolved that they would take no notice of his application for relief; they refused, in fact, to hear the appeal at all. The proper course, under those circumstances, would have been to have applied to this Court for a mandamus, to compel them to hear his appeal; if they had heard it, and come to a determination upon it, and he had been dissatisfied with that determination, he might then have appealed to the quarter sessions. In *Rex v. Tucker*, the justices at petty sessions heard the evidence and dismissed the appeal. The rule for a mandamus must be discharged.

Rule discharged (*a*).

(*a*) This case was argued and determined in the term, but was unavoidably omitted in its proper place.

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By an order of the Court of Chancery, made in a suit depending between the lessee and lessor, the lease was deposited in the hands of the lessor's attorney, the lessee being at liberty to inspect the same. Upon ejectment brought by lessee against the tenant in possession; it was held, that the attorney of the lessor was bound to produce the lease, it not being part of the lessor's title.

The lease, when produced, appeared to have had the names of the parties torn off: Held, that that was not a surrender by operation of law, nor *prima facie* evidence of a surrender by deed or note in writing, and that the lease was evidence of the lessee's title.

It appeared that before the lease was granted, the demised premises were settled for life on A., with power to charge the estate with an annuity for any husband she might marry, and portions for younger children, and power to grant leases for twenty-one years; and that she granted, bargained, sold, demised, limited, and appointed the same to trustees for the term of 500 years, upon trust that they should (if she should by deed so direct and appoint), by mortgage, or sale of the said premises for the whole or any part of the term of 500 years, raise portions for younger children: Held, that, taking the whole deed together, the term until it was called into action was subservient to the leasing power; and that to an ejectment brought by a lessee, holding under a lease granted subsequently to the deed of settlement, the term for 500 years was no answer.

EJECTMENT. Plea, not guilty. At the trial before *Gaselee J.*, at the Summer assizes for the county of *Hereford* 1828; it appeared that the lessor of the plaintiff claimed under a lease alleged to have been granted to him on the 18th of *February* 1828, by the Honorable *Booth Grey*, and *Francis Ann* his wife. In order to prove that such a lease existed, the plaintiff called the attorney who had the lease in his possession. He stated upon the *voir dire* that he was the attorney for the Honorable *Booth Grey*, and that he had received the lease in his character of attorney from Mr. *Grey*, and that he held it in that character. The learned judge was of opinion that he ought not to produce the lease, it having been given to him in his confidential and professional capacity. The plaintiffs then put in a bill filed by *Courtail* against the defendant, and Mr. *Grey* and the defendant's answer; and it appeared thereby that he held under a demise from *Grey*, made subsequently to the supposed lease. An order of the Court of Chancery made in the suit was also read, whereby the defendants, *Thomas* and *Grey*, were ordered within ten days to deposit at the office of Messrs. *Bateman* and *Jones* the lease (which they alleged to be

cancelled,) and the counterpart, and the plaintiff in equity, *Courtail*, was to be at liberty to inspect the same. Upon this evidence, the learned judge was of opinion that the lease ought to be produced. The lease was then produced, and it appeared that the names of the parties had been torn off, but it was proved to have been in the possession of *Courtail* in a perfect state. It was then objected, that as the lease was produced in a cancelled state, some evidence should be given on the part of the lessor of the plaintiff, to shew how it came to be in that condition; the *prima facie* presumption from the state it was in, being that it had been surrendered. The learned judge was of opinion, that as the lease was proved to have been executed and delivered to the lessor of the plaintiff, he had made out a *prima facie* case, and that it lay on the defendant to shew that it had been surrendered by deed or note in writing, or by act and operation of law. The defendant then set up an outstanding term in Lord *Stanford* at the time, when *B. Grey* granted the lease to the plaintiff; and for that purpose, put in the will of *Thomas Pryce*, the father of *Mrs. Grey*, who being seised in fee of the premises in question, by will of the 10th of *July* 1788, devised all his freehold and copyhold manors, messuages, &c., to trustees in trust; as soon as his youngest daughter should attain the age of twenty-one, to convey the same to the use of *Frances Anne*, his eldest daughter, for life, and with power to her to charge the estate with an annuity of 400*l.* a year for any husband she might marry, and also 5000*l.* for the use of her child or children. There was a power for the trustees, or the daughters, when of full age, to make leases for twenty-one years. *Elizabeth*, the youngest daughter, attained the age of twenty-one on the 17th of *March*

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March 1802; and by lease and release of the 17th and 18th of *March* 1802, the trustees conveyed the estate to *Frances Anne*, (Mrs. Grey) for life in pursuance of the will. On the 19th of *March* 1802, by a settlement on her marriage, made between *Henry* Earl of *Stanford* of the first part, *W. B. Grey*, the second son of the said Earl, of the second part, and the said *Frances Ann Grey* (then *Frances Ann Pryce*) of the third part, and the Right Honorable *George Harry Grey*, eldest son of the said Earl, and *W. Digby*, of the fourth part, Mrs. Grey charged the estates with an annuity of 400*l.* for her husband, and 5000*l.* for younger children. The deed of settlement then proceeded as follows: — “ And the now stating indenture witnesseth, that in further pursuance of the powers aforesaid, and for the consideration thereinbefore expressed, she, *Frances Ann Pryce*, did grant, bargain, sell, demise, limit, and appoint, unto the said *G. H. Lord Grey* and *W. Digby*, their executors, &c., all and singular the said manors, messuages, farms, lands, tenements, and hereditaments, given and devised by the said thereinbefore recited will, and by the now stating deed, charged and made liable as aforesaid, to hold the same, with their appurtenances, (but subject, and without prejudice, to the said rent-charge of 400*l.*) unto the said *G. H. Lord Grey* and *W. Digby*, their executors, &c., for the term of 500 years from thenceforth next ensuing, upon trust; that if there should be one or more child or children of the said intended marriage, (other than and except an eldest or only son) then, that they *G. H. Lord Grey* and *W. Digby*, or the survivor of them, his executors or administrators, should immediately after the decease of the said *Frances Ann Pryce*, or in her life-time, if she should by any deed so direct or appoint, by mortgage, sale, or other disposition,
of

of all or any part of the said manors, hereditaments, and premises, thereinbefore granted and demised for all or any part of the said term of 500 years, or by and out of the rents, issues, and profits, of the same premises, or by all or any of the said ways, means, or by any other such ways or means as the said trustees should think reasonable and proper, levy and raise for the portion or portions of such child or children (other than and except an eldest or only son) the sum of 5000*l.*; and pay or divide the same in the manner therein particularly mentioned." It was contended, that as the term was made to commence not after the death of the tenant for life, but was created out of the life estate, it vested in the trustees from the execution of the settlement; and that therefore, although there was a power to grant leases for twenty-one years, that power was subject to the term of 500 years, which was the first legal estate. On the other hand, it was insisted that the power of leasing displaced this outstanding term, and that as the defendant claimed under *B. Grey*, he was estopped from setting up the term. *Gaselee J.* was of that opinion, and a verdict was found for the lessor of the plaintiff. In last *Michaelmas* term,

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Campbell moved for a new trial upon all the points. First, he contended the attorney ought not to have been compelled to produce the lease. The answer in Chancery, and the order made in the suit, proved the statement to be correct that the attorney held the lease in his confidential and professional capacity. No notice was given to the defendant to produce the lease, but the attorney was served with a subpoena duces tecum. But he contended secondly, that the lessor of the plaintiff ought

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ought to have given some evidence to explain how the lease came to be in the possession of the lessor in a cancelled state. For although, since the statute of frauds, the mere cancelling of a lease will not amount to a surrender, *Roe dem. Berkley v. The Archbishop of York (a)*, yet as the lease was in the possession of the lessor in a cancelled state, a presumption thence arose, that there had been a surrender in writing, or by act and operation of law, and it then lay upon the lessor of the plaintiff to rebut that presumption, by shewing how it came to be in that state. It was *prima facie* evidence of a surrender, on the same principle that the possession of a bill of exchange by the acceptor is evidence of payment. Thirdly, he contended that the defendant *Thomas* was not estopped from setting up this outstanding term. There was no privity between *Courtail* and *Thomas*. The latter was in the nature of a purchaser; (it being wholly immaterial whether he purchased by a fine or a rack-rent,) or in the nature of a mortgagee, where there has been a prior mortgage. Now where there had been three mortgagees, it was held that the third mortgagee, having obtained the legal estate, might bring ejectment against the former two, *Goodtitle v. Morgan (b)*. [Lord Tenterden C. J. There the last mortgagee had got in an outstanding term.] Suppose that the first mortgagee brought an ejectment against the second mortgagee, then the question would be whether the second mortgagee could set up a term prior to the first mortgage. The question in the present case is much the same. It seems quite clear upon the authority of that case, that the second mortgagee might set up a prior term. Here the trustees of the term might

(a) 6 *East*, 86.

(b) 1 *T. R.* 755.

have

have brought an ejectment to have got into possession, to raise the 5000*l*.

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LORD TENTERDEN C. J. It appears clearly that Mr. *B. Grey* might have been subpoenaed at the trial and compelled to produce the lease, because it is not part of his title. And if he could be compelled to produce it, then Mr. *Jones*, who stands in the situation in which Mr. *Booth Grey* did, was bound to produce it.

As to the point relating to the outstanding term, in order to get properly at the effect of that term, we must look at the whole of the instrument. It is a well established rule, that every instrument is to be construed by all that is contained in it. Now it appears that an estate was given to Mrs. *Grey* for life, with a power to her to grant leases for twenty-one years. Then the term for 500 years is made to commence in computation of time immediately, but for certain purposes it is not to take effect immediately. Mr. *Grey* is to have an annuity under her power during his life, and a sum of money is to be raised for the children, which cannot be raised except under the same authority, emanating from Mrs. *Grey*. Now, if we were to hold that the term which was vested in the trustees was to be the first legal estate in the premises, uncontroled by any other matter, the leasing power would be null and void, because the person in whom the term is vested might then at any time turn out the lessees. In order to avoid that inconvenience, and to give effect at the same time to the whole import of the instrument, we must consider the leasing power as controuling and superseding the term, and hold that

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the term ought not to have effect until the period when the trustees call that term into action. When they have called that term into action, the leasing power will be put an end to; but, until that be done, the term must be considered as subservient to the leasing power.

When this lease was produced at the trial, it came from the hands, not of the lessee, but of the lessor; and it was in a cancelled state. That raised a question, upon whom lay the burthen of shewing how, and under what circumstances, it came to be in a cancelled state. In the case of *Roe d. Berkeley v. The Archbishop of York (a)*, the circumstances under which the lease was cancelled were clearly explained. There it appeared that the first lease was cancelled merely with a view of granting another good and valid lease: the presumption of a good and valid surrender, which might otherwise have arisen from the instrument being in a cancelled state, was thereby rebutted; and it was held that the cancellation of the former lease did not defeat the estate of the lessee. Nothing of that kind appears in this case. The lease in the hands of Mr. Grey (if valid and subsisting) ought not to be in the state in which it is: I think it is fit to consider, whether the fact of its being in a cancelled state, in the hands of the grantor, unexplained, was not *prima facie* evidence of a good and valid surrender; and whether, under such circumstances, it was not incumbent on the party who insisted that it was a valid subsisting lease to shew how it came to be in a cancelled state. Upon that point only, I think there should be a rule for a new trial.

(a) 6 East, 86.

Tawnton and *Maule* now shewed cause. Since the statute of frauds, there cannot be a valid surrender of a lease except by deed or note in writing, or by act and operation of law. There is no pretence for presuming in this case a surrender by operation of law. The fact of the names having been torn off the instrument, was not *primâ facie* evidence of a surrender by deed or note in writing. The only presumption arising from that fact is, that the lessee intended to surrender, — not that he actually had surrendered. There was no evidence that any note in writing ever existed; and there is no ground, therefore, for presuming that it did. *Magennis v. McCullogh* (a) is an express authority to shew that, since the statute of frauds, a lease for years cannot be surrendered by cancelling the indenture; because (as it is there stated) the object of the statute was to take away the manner they formerly had of transferring interests in land by signs, symbols, and words only.

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Campbell and *Russell* Serjt. contrâ. The fact of the lease having been produced in a cancelled state, raises *primâ facie* a presumption that the parties not only intended to cancel it, but that, in pursuance of that intention, they had done all which the law requires to effect that intention. It lay on the party who relied upon the instrument as a valid subsisting lease, to shew the circumstances under which it became cancelled, in order to rebut the *primâ facie* presumption of a valid surrender, arising from the fact of its being in that state. In *Roe dem. Berkeley v. Archbishop of York*, it was stated in

(a) *Gill. R.* 235.

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argument, and not denied, that although before the statute of frauds there could be no surrender of a thing lying in grant except by deed, yet it was always considered that the cancelling of a lease of a thing lying in grant was *evidence* of a surrender; and, in *Bacon's Ab. tit. Lease*, (S), 3. it is said, "if a lessee for life or years take a new lease of the same lands, though such second lease be void for any defect in the making or execution of it, yet it is a surrender of the first lease, &c.; and such contract for a new lease is good *evidence* to a jury of a surrender." Upon the same principle in this case, the fact of the lease being in a cancelled state is evidence of a surrender.

BAYLEY J. This is a very clear case. The lease, which was duly executed, found its way into the possession of the lessee, and began to operate. The statute of frauds says, that no lease shall be surrendered unless by deed or note in writing, or by act and operation of law. In this case there is no pretence for saying that there was a surrender by act and operation of law. Then is there or is there not reasonable ground for saying that there was a surrender by deed or note in writing? The lease is now in the possession of the lessor: how it got there does not appear. The names are cut off: how they came to be cut off does not appear. But when the period of time which has elapsed since the lease was granted and the present period, and also the state in which these parties have been during part of the intermediate space of time, is considered, is there any foundation for saying that there has been a note in writing by which that lease has been surrendered?

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The period of time at which it found its way into the possession of the defendant, Mr. *Grey*, does not appear, nor how he got it: nor whether he got it immediately from Mr. *Courtail*, or from any person in whose hands Mr. *Courtail* had deposited it, or in what state it was when he got it from Mr. *Courtail*. But this does appear, that in the intermediate space of time there was a bill in chancery, and an answer in chancery, and that an order was made in that suit that this lease should be produced for the inspection of Mr. *Courtail*, when he should reasonably require it. That, therefore, does raise an inference that there has been some dispute between these parties upon the subject of this lease, and upon the subject of the state in which the lease was. Now the lease is in the possession of Mr. *Grey*. That alone is no evidence of its having been surrendered. It is properly conceded, that it is only upon the ground that we may be warranted, from the state in which the lease is, in presuming that there had been a note in writing, that we can say the provision of the statute of frauds has been complied with. Now the fact of its being in the possession of Mr. *Grey*, and in a cancelled state, does not seem to me to furnish any presumption in this case of there having been a note in writing. It is for Mr. *Grey* to make out that it has been duly surrendered. The burthen of proof in that respect lies upon him. He has, it is true, in his possession the instrument in a cancelled state, but that warrants an inference only that somehow or other it got into his possession in a cancelled state. That alone will not do. That does not make out his case. He must rely upon a surrender by deed or note in writing; and there is no evidence at all of there ever having been a surrender by

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deed or note in writing. If this lease had been in possession of Mr. *Grey*, without any dispute, for a long series of years; or if there had been any destruction of Mr. *Grey's* papers, or any change of residence, or any foundation for supposing that there might have been a note in writing, and that that note had been destroyed, that might have been a ground for raising a presumption that there was a note in writing accompanying the lease when it got into Mr. *Grey's* possession. But in this case there is no reason to suppose that there ever was a note in writing accompanying that document when it found its way into the possession of Mr. *Grey*. I therefore think that the verdict was right, and that the rule must be discharged.

LITTTLEDALE J. It is quite clear that there was not in this case any surrender by operation of law. A surrender by operation of law takes place where a lessee for life enfeoffs him in reversion in fee, or where the lessee and lessor join in a feoffment; or where a lessee for life or years accepts a new lease from the lessor. Then, if there was not any surrender by operation of law, the question is, whether a surrender by deed or note in writing is to be presumed in this case. The statute of frauds expressly requires a surrender to be by note in writing, or by act and operation of law. To put the case in the strongest way for the defendant, I will suppose that Mr. *Courtail* and Mr. *Grey* met together, that it was agreed between them that Mr. *Courtail* should give up the possession of the property, and that the lease should be cancelled, and that they cut off the names with the intention of cancelling the lease; and, upon such a state of facts, I think it perfectly clear
there

there would not have been a valid surrender of the lease since the statute of frauds. This was the very mischief intended to be remedied by that statute. Before that statute, people put an end to terms by parol. The object of that statute was to prevent terms being surrendered by any mode but by deed or note in writing. If this very case had been submitted to the person who framed the statute, I think he would have said that it was one of the cases to be guarded against. The question, whether there has been a surrender or not, ought not to be left to depend on loose parol evidence. If this were to be considered a good surrender, it would defeat the object of the statute of frauds altogether. I do not mean to say, that if the parties had been out of possession twenty years, and from other circumstances there was reason to suppose there had been some note in writing, that it might not have been left to the jury to say whether such note in writing had not been lost. It has been made a question in some cases whether there has been a valid surrender; but in all those cases there has been some note in writing. That was so in *Farmer v. Rogers* (a), and *Smith v. Mapleback* (b). Here there is no ground for presuming that there was any note in writing. The rule for a new trial must be discharged.

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PARKE J. This is a very clear case. The instrument, having been once operative as a lease, cannot be got rid of except by a surrender by operation of law; or by a deed or note in writing. It is contended, that the presumption in this case is that there was a surrender by note in writing. It appears to me impossible

(a) 2 Wils. 26.

(b) 1 T. R. 44.

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to draw any such inferences. The fact of a lease being found in the possession of the lessor in a cancelled state, raises a presumption only that it was the intention of the parties to put an end to the term by cancelling the instrument. That is a mode of putting an end to the term which the law will not allow; and if so, there is nothing to raise the presumption that there was a surrender by deed or note in writing. It seems to me that we cannot in this case draw from the facts any further inference than that the parties intended by this step to put an end to the operation of the lease by means which the law will not allow; and if so, the lease continues in operation.

Rule discharged (a).

(a) See *Bac. Abr. Leases*, (T).

SMALL and Another, Assignees of CAMPION, a
Bankrupt, against MARWOOD.

By a composition-deed, the insolvent assigned to four trustees all his goods, chattels, &c., upon trust to sell and to apply the proceeds rateably in discharge of his debts amongst his creditors, who

should execute the deed; provided that the trustees and the creditors should, on or before a given day, make proof of the debts (if required), and execute that deed. The creditors, as a release of their respective debts, covenanted that they would not implead the insolvent or his goods. The deed was executed by two only of the trustees: Held, that the deed was not therefore void; and that the debt of a trustee who had executed it was thereby extinguished, and that he could not sue out a commission of bankruptcy.

ASSUMPSIT for money had and received for the use of the plaintiffs as assigness, and for money lent and advanced, &c. Plea, general issue. At the trial before Bayley J. at the Summer assizes for the county of York 1828, it appeared that the action was brought to recover the sum of 161*l.*, the value of goods of the bankrupt sold under an execution by the defendant,

chief

chief bailiff of the liberty of *Loughborough*, in the North Riding of *Yorkshire*. The goods were seized on the 7th of *March* 1827; the date of the commission was the 22d of *March*; notice was given to the defendant, but he afterwards sold the bankrupt's goods. The act of bankruptcy was the lying in prison more than two months. The petitioning creditor was one *John Barr*, and the question was, whether he had a good petitioning creditor's debt: and that depended on the effect of a deed of assignment made the 23d of *December* 1826, between the bankrupt of the first part; *John Barr*, *Thomas Hudson*, *Robert Johnson*, and *Thomas Coser*, (being respectively creditors of the bankrupt) of the second part; and the several persons whose names were thereunder written, and seals affixed, (being also creditors) of the third part. The deed recited that the bankrupt stood indebted to the several persons, parties of the second and third parts, in the several sums of money set opposite to their respective names in the schedule thereunder written; and that he was unable to discharge the several demands upon him, and had proposed to assign to the said *J. Barr*, *T. Hudson*, *R. Johnson*, and *T. Coser*, all his personal estate and effects, upon the several trusts thereafter mentioned, and they and the creditors, parties thereto of the third part, had agreed to accept such assignment in full satisfaction of their respective demands, and to give such release for the same as thereafter mentioned. The deed then witnessed that, for the considerations therein mentioned, the bankrupt had granted, bargained, sold, assigned, transferred, and set over unto the said *J. Barr*, *T. Hudson*, *R. Johnson*, and *T. Coser*, their executors, &c., all and every the household goods and furniture, and all the stock in trade, goods, wares,

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wares, and merchandize, book and other debts, bonds, notes, bills, and securities, of or belonging to him the said bankrupt, to have, hold, receive, and take all and singular the said household goods, &c., thereby assigned unto them the said *J. Barr, T. Hudson, R. Johnson, and T. Coser*, their executors, &c., wholly and absolutely as their own proper goods and chattels, upon trust that they or the survivors or survivor of them, his executors, &c., should with all convenient speed sell and dispose of all the said personal estate and effects, and get in the debts and monies owing to the bankrupt, and stand and be possessed of and interested in the money so to be received as aforesaid upon trust; in the first place, to pay the costs of the deed of assignment, and the costs of an execution which the said *T. Hudson* had entered against the estate of the bankrupt, and which he had relinquished, and the costs which they the said *J. Barr, T. Hudson, R. Johnson, and T. Coser* should sustain in carrying that indenture and the trusts therein contained into effect; in the next place, to pay themselves and the rest of the creditors all such sums of money as should appear to be due and owing to them from the bankrupt (to be proved, if required, by affidavit before a master in chancery); or, in case of a deficiency, to pay such creditors rateably, and in proportion to their respective debts, *provided the parties thereto of the second and third parts should, on or before the 1st of February then next, make such proof as aforesaid, if required, and execute that indenture*; and in case there should be any surplus, to pay the same unto the bankrupt. There then followed a covenant by the trustees and creditors, to and with the bankrupt, his executors, &c., that they the said creditors, parties thereto of the second and third parts, should not

nor

nor would sue, arrest, implead, or prosecute him the said bankrupt, his executors, &c., or his, their, or any of their goods, chattels, lands, or tenements, for or upon account of any debt or sum of money then due or owing unto them; and in case any of the creditors, parties thereto, their executors, &c., should sue or prosecute the said bankrupt, or his executors, &c., for any such debt as last aforesaid, that then that indenture should be a sufficient receipt and discharge, both at law and in equity, to and for the said bankrupt and his executors, &c.; and he and they should be and were thereby acquitted and discharged against them the said creditors parties thereto, their executors, &c., who should sue or prosecute the said bankrupt, his executors, &c., contrary to the intention of that indenture, and as such should and might be pleaded by the bankrupt, his executors, &c. The deed was executed by two of the trustees only, viz. *Barr* and *T. Hudson*. It was contended, that as *Barr* the petitioning creditor under the commission was a party to the deed, he thereby released his debt, and there was no good petitioning creditor's debt. On the other hand, it was insisted that the deed itself was void, because two of the trustees only had executed it; and if void, then *Barr's* debt was not extinguished. *Bayley J.* was of opinion that *Barr's* debt was extinguished by the deed, and nonsuited the plaintiff; but reserved liberty to him to enter a verdict, if the Court should think the debt was not extinguished. A rule nisi having been obtained for that purpose,

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Hutchinson now shewed cause. A person who is a party to a deed of assignment for the benefit of creditors, cannot set it up as an act of bankruptcy; *Bamford v. Baron*;

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Baron (a); but other persons may; and it is no answer to an action by assignees, that some of them had concurred in such deed, *Tappenden v. Burgess (b)*. But where a composition deed itself is wholly void by reason of a prior act of bankruptcy, a creditor who has executed it, and received a dividend under it, may become a petitioning creditor in respect of his original debt, because that debt is not extinguished by the void deed, *Doe v. Anderson (c)*. Here, however, *Barr* was a party to a valid deed; his debt was therefore extinguished by the release contained in that deed. But then it is said the deed is absolutely void, by reason of its being executed by two of the trustees only. The effect of that, however, is not to avoid the deed, but to prevent those who have not executed it from availing themselves of its provisions.

J. Williams contra. *Bamford v. Baron*, and *Tappenden v. Burgess*, are authorities to shew that a party who executes and receives a dividend under a composition deed, cannot set it up as an act of bankruptcy; and *Doe v. Anderson*, that a creditor who, in ignorance that an act of bankruptcy has been committed by his debtor, executes such a deed for the amount of his debt, and receives a dividend under it, may become a petitioning creditor in respect of his original debt, that debt not having been extinguished by the deed which was wholly void by reason of the previous act of bankruptcy. Assuming that the deed in this case is not actually void, it might have been avoided at any time, and set up as an act of bankruptcy by any creditors who

(a) 2 T. R. 594. n.

(b) 4 East, 230.

(c) 5 M. & S. 161.

did not execute it. Such a deed will not extinguish the debt. But, secondly, the deed is not voidable, but actually void; it is not to take effect till all the four trustees execute. That is a condition precedent to the deed having any operation. The trust is joint. The confidence is reposed in the four trustees jointly; and then follows a proviso that the parties of the second part shall execute the deed on or before a given day. Not having done so, the deed is void for non-performance of the condition. Assuming the deed to be void, it does not extinguish the debt, but only takes away the remedy. The creditor is prevented by the deed from suing his debtor; but if the debt remain, it will be sufficient whereon to found a commission.

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 ———
*Suam
 against
 Mahmood.*

Cur. adv. vult.

BAYLEY J. There was a motion in this cause to enter a verdict for the plaintiff. The only point for our consideration was, whether *Barr* was precluded by the deed of the 21st of *December* 1826 from suing out the commission which issued in *May* 1827. There was, independently of the deed, a good act of bankruptcy by lying in prison two months. By that deed the bankrupt conveyed all his personal estate to *J. Barr*, *T. Hudson*, *B. Johnson*, and *T. Coser*, upon trust to pay and discharge the costs of *Hudson's* execution, and of the deed; then to pay themselves and the rest of the creditors rateably, in proportion to the respective debts. Then came the following proviso: "Provided that the said parties of the second and third parts shall on or before the 1st day of *February* next make such proof if required, and execute these presents." It was contended that the words, "and execute these presents," constituted

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constituted a condition, and that the deed having been executed by *Barr* and *Hudson* only, and not by the other two trustees, was void for non-performance of that condition; and being void altogether, that *Barr's* debt was not extinguished, and therefore was a good petitioning creditor's debt to support the commission. We are of opinion that the effect of those words in the proviso is not to avoid the deed if the parties therein named shall not execute it, but merely to take away from such parties the right to recover a dividend. The deed contained a covenant by the creditors not to sue, arrest, implead, or prosecute the bankrupt, or his goods or chattels, lands or tenements, for or on account of any debt; and if they did, that the deed might be pleaded as a release of any such debt. The issuing of a commission is a species of suit and proceeding against the goods of the bankrupt. The deed, therefore, if it be valid, prevents the issuing of a commission. It was contended that the deed was wholly void, on the ground that *Johnson* and *Coser* had not executed it. It appears to us to be clearly established by several decided cases, that the deed is not for that reason void. In *Smith v. Wheeler (a)*, *Simon Maine*, being possessed of two parts of a rectory for eighty years, in 1643 made, by indenture, an assignment of them to *Crook* and *Bleak*, upon trust for himself for life, and after his decease for payment of his debts, and for the raising of several sums to be paid to divers of his kindred; with a proviso that if he should leave issue, then in trust for that issue. It was found upon special verdict that he had issue a son, and that he took the profits during his life; that the assignees had no notice of the trust during his life; and

(a) 1 Vent. 128. 2 Keb. 364.

that

that after his death one of them assented, the other dissented; that in 1648 he committed treason and was attainted, and died in 1661; and that the king granted his interest to *Smith* the plaintiff. The question was, whether the whole term was forfeited by the treason. The whole must have been forfeited unless it passed under the assignment to the trustees. It was adjudged in the Common Pleas by *Tirrel* and *Archer* (they being the only judges then in court), for the defendant *Wheeler*, that it was not forfeited. They must, therefore, have been of opinion that it passed to the trustees. Their judgment was affirmed, after argument, in error, in the Court of King's Bench; and *Hale* C. J. said, "*Crook* is a good lessor, for the other trustee's disagreement makes the estate wholly *his*." Although the trustees in that case did not know of the deed until the death of the assignor, the whole term was held to pass to the trustee who assented. That case, therefore, shews that where there is an assignment to two trustees, and one assents and the other dissents, the property passes to that assenting trustee. A party may, by express proviso, make the deed void unless all the trustees assent to the trust estate. But, unless there be such a proviso, the property will pass to the assenting trustee. In *Crewe v. Dicken* (a), one trustee for the sale of an estate, being unwilling to act in the trust, released and conveyed all his estate and interest to his co-trustee. The latter contracted with *Dicken* to sell the estate to him. He refused to take the conveyance unless the other trustee would join in giving a receipt for the purchase-money. Upon bill filed by the acting trustee to compel the pur-

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(a) 4 Ves. 97.

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chaser to complete his contract, the latter insisted that the other trustees ought to join; and Lord *Loughborough* was of opinion there that if the other trustee had merely renounced, the whole estate would have been in the acting trustee, exactly as if the other trustee had died in the lifetime of the testator; but he thought that the other trustee could not have released without having assented to the conveyance; and on that ground he refused to compel the purchaser to complete his contract. That case, therefore, is an authority to shew that where there is a conveyance to two trustees, and one dissents (without having done any act to shew that he ever assented to the conveyance), the whole property vests in the assenting trustee; but if the trust estate be once accepted by both, it is essential that both should join in giving the purchaser a discharge for the purchase-money, and that the execution of a release by a trustee necessarily implied an acceptance of the trust estate. That decision (as to the last point) was corrected by Lord *Eldon* in *Nicolson v. Wordsworth* (a). There a bill was filed against the defendants (of whom *Hutton* was one) by a purchaser, to compel them to convey an estate which he had purchased. It appeared by the answer that *Richard Wordsworth*, by his will, made *Hutton* (with others) his executor, but that *Hutton* renounced probate, and refused to act in the trusts of the will; and by indenture bargained, sold, released, quitted claim, and conveyed to the other executors, their heirs and assigns, his estate in the property. It was contended that the release was an acceptance of the devised estate. On the other hand, it was insisted, that a release made with

(a) 2 *Stannist.* 365.

an intent to disclaim was equivalent to a disclaimer. When the arguments were concluded, Lord *Eldon* is reported to have said, "It seems to have been taken for law from an older period than the date of *Crewe v. Dicken*, and sanctioned by Lord *Hale*, that if an estate is conveyed to two persons in trust, and one will not act as trustee, the estate vests in the other. If, therefore, the party executes a simple instrument, and under his hand and seal declares that he disclaims, — that is, dissents from being a trustee, — the fact must be taken to be that he is no trustee. But in *Crewe v. Dicken* the difficulty occurred that, instead of doing this, the party conveyed his estate to the other trustee." After stating Lord *Loughborough's* opinion as to the effect of the release, he continued: "If the essence of the act is disclaimer, and if this point were *res integra*, I should be inclined to think that if the mere fact of disclaimer is to remove all difficulties, and vest the estate in the other trustees, a party who releases, and thereby declares that he will not take as trustee, gives the best evidence that he will not take as trustee." And he ultimately decided that where the release is made with an intention to disclaim, the property vests in the willing trustee. All these cases go on the same principle, that it is not essential that all the trustees should execute a deed or accept a trust. Then, to apply that principle to this case, *Barr and Hudson* accepted the trust, the other two trustees disclaimed it. The consequence, therefore, is, that the property vested in the two willing trustees. I entertained a doubt for some time whether the deed would operate as a release of the debt due to *Barr* unless the personal estate was handed over. But, on consideration, I am satisfied that the deed is not in-

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operative on that ground. *Barr* and *Hudson* have got all that the deed stipulated to give them, if they think fit to take it. The release is in consideration of the assignment; it is therefore an operative deed. The debt was thereby extinguished, and it follows that the commission cannot be supported.

Rule discharged.

DELANE against HILLCOAT.

By stat. 3 G. 4. c. 126. s. 65. no trustee of any turnpike road shall enjoy any office or place of profit under any act of parliament, in execution of which he shall have been appointed, or act as trustee; and if any person, after having been appointed a treasurer or a trustee, shall, without having first duly resigned such office at some meeting of the trustees of the road, hold any such office, he shall forfeit 100*l*.: Held, that a trustee, who accepted the office of treasurer, but allowed another to receive the rents of the tolls, and never made a profit, was liable to the penalty if the office yielded any profit.

THIS was an action of debt on the statute 3 G. 4. c. 126. s. 65. (a), brought to recover from the defendant penalties for holding the office of treasurer, under an act of parliament for repairing a turnpike road, in the execution of which he had been appointed

(a) By which section it is enacted, "That no trustee or commissioner of any turnpike road shall, from and after this act shall be in force, enjoy any office or place of profit under any act of parliament, in execution of which he shall have been appointed, or shall act as a trustee or commissioner, or have any share or interest in, or be in any manner directly or indirectly concerned in any contract or bargain for making or repairing, or in any way relating to the road for which he shall act, or for building or repairing any toll-house, &c.; nor shall any such trustee or commissioner let out for hire any waggon, &c. for the use of any turnpike road for which he shall act as a trustee or commissioner, nor by himself or by any other person for or on his account, directly or indirectly, receive any sum or sums of money to his use or benefit out of the tolls collected on the road for which he shall act, during the time he shall be acting as a trustee or commissioner of such road; and if any person, after having been appointed or elected a trustee or commissioner of any turnpike-road, shall, without having first duly resigned such office at some meeting of the trustees of the road for which he shall have been elected or appointed, hold any such office or place, &c., every trustee or commissioner so offending shall, for every such offence, forfeit the sum of one hundred pounds to any person who shall sue for the same."

a trustee.

a trustee. Plea, nil debet. At the trial before *Gaselee J.*, at the Summer assizes for the county of *Berks* 1828, it appeared that the defendant, being a trustee under a local act for repairing the turnpike road from the *Old Gallows* through *Wokingham* to *Virginia Water*, was, on the 5th of *August* 1822, elected treasurer, and did not resign his office of trustee. One *Roberts*, the clerk to the commissioners, who was an attorney, and also acted as a banker, received all the rents of the tolls, and made all payments on account of the trust. The defendant never exercised any control over or made any profit of the money. In the year 1823 the balance in the hands of *Roberts* was under 200*l.* In 1824, 1825, and 1826, it exceeded that sum; and in 1827 it exceeded 600*l.* During those years there was a floating debt due from the trustees to various persons, amounting to between 200*l.* and 300*l.*, and in *October* 1825 the defendant's accounts as treasurer were audited, and allowed at a meeting where he acted as chairman. The learned Judge was of opinion that the defendant could not be said to have held any office of profit within the meaning of the statute 3 G. 4. c. 126. s. 65., and nonsuited the plaintiff, but reserved liberty for him to move to enter a verdict for one penalty. A rule nisi having been obtained for that purpose,

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Alderson now shewed cause. The nonsuit was right. The statute, being penal, must be construed strictly; and so construing it, the defendant, to whom the office never yielded any profit, cannot be said to have held an office of profit. But at all events the rule can be made absolute for a new trial only. For upon the evidence it was a

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question of fact for the jury, whether the office was one which yielded any profit to any person.

Taunton and Talfourd contra. The question under the act of parliament is, not whether the defendant personally made a profit of the office of treasurer, but whether the office was one of which, by its nature, profit might be made. Suppose the treasurer were paid by a salary, would the office be less an office of profit, because the party holding it allowed the salary to be taken by another? If this would make no difference, then is there any real distinction between the advantage of a salary, and that notoriously derived from a control over considerable sums of money, which is often eagerly sought for in the present state of pecuniary transactions, and even preferred to payment by a fixed and ascertained salary? Whether any profit was actually made of these balances, either by *Hillcoat* or *Roberts*, is immaterial: it may be, that the possession of balances may turn to the prejudice of the party possessing them; but this cannot affect the nature of the office which he holds. The situation of *Roberts*,^{*} as an attorney practising in the county, is one which is particularly favourable to the object of making profit from comparatively small balances; and the very circumstance that he continued to act as treasurer in *Hillcoat's* name, when he could no longer do so in his own name, in consequence of the penalty attached to the same person being both clerk and treasurer, shews that the office was an object of desire for the practical benefits resulting from it. At all events, if the office of treasurer be not necessarily an office of profit, the question whether it was so under the

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circumstances proved in evidence, was a question for the jury, and ought to have been submitted to them for their decision.

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BAYLEY J. The question in this case, is not whether the defendant himself made a profit of the office; but whether the office was one which enabled him to make a profit. Now, if the available balance in the hands of the clerk were such, that it might reasonably be expected that a man would make a profit of it, it must be considered an office of profit. I think that the Judge, instead of nonsuiting the plaintiff, ought to have submitted to the jury the question, whether the average balance in the hands of *Roberts* was such that a man might reasonably be expected to make a profit of it.

LITTLEDALE J. I am of the same opinion. If the average balance was so small that a banker would not allow interest for it, the office in that case might not perhaps be considered an office of profit; but, if it amounted to a sum for which a banker would allow interest, it must be considered an office of profit; and though the defendant did not receive the profit himself, he has incurred the penalty imposed by the act of parliament by enjoying an office of profit.

PARKE J. The question in this case is, Whether the office of treasurer can be considered an office of profit? I think, upon the evidence, it ought to have been submitted to the jury whether there was such an average balance in the hands of *Roberts*, that it might reasonably be expected that the person holding that balance would

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make a profit of it. The rule must be made absolute for a new trial.

Rule absolute for a new trial (a).

(a) The cause was tried again at the Summer assizes for the county of Berks, 1829, when *Roberts* proved that the balances were mixed up with his own money; that he was in the habit of lending sums of money at interest; and that, in this manner, he had from time to time made interest of sums composed in part of such balances; but that he had available means by which he could at all times have obtained and refunded any balance due to the trust. On this evidence *Vaughan B.* left the case to the jury, on the question, whether it was an office of profit; as if profit was made by *Roberts*, he was of opinion the office was an office of profit, and that it was immaterial by whom such profit was received. The jury found that it was an office of profit, and that profit had been made of it by *Roberts*.

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FARR against HOLLIS, Gent., one, &c.

DEBT on two bonds, the first bearing date the 6th of April 1812, given to the plaintiff, as clerk of the peace for the county of *Southampton*, for 5000*l.*; the second

The condition of a bond, — after reciting that the obligor had been nominated treasurer and receiver

of the rates and assessments made for the county, upon his giving security to the clerk of the peace for the due and faithful execution of the trusts reposed in him according to the statute, — was, that the obligor should, when he was thereto required by the justices of the peace assembled at quarter sessions, or the major part of them, or by any committee of the said magistrates duly appointed for that purpose by any order of the said court of quarter sessions, now made, or hereafter to be made, well and truly account for all sums of money received by him by reason or on account of his office; and also should faithfully perform all the trusts reposed in him by virtue of his said appointment: Held, that by the condition of this bond, the county treasurer was bound to account for monies received by him in discharge of duties imposed on him by acts of parliament passed subsequent to the 12 G. 4. c. 29., which required that the county treasurer should give sufficient security to be accountable for the money paid to him in pursuance of that act, and for the due and faithful execution of the trusts reposed in him; and that a breach of the condition was sufficiently assigned which stated, that the defendant, while he was treasurer, received divers sums of money, and that he was required by the justices at sessions to account, but did not do so; it being unnecessary to allege that he had been required by an order of the court of quarter sessions, the words in the condition of the bond, “by any order of the said court of quarter sessions now made, or hereafter to be made,” applying only to the appointment of a committee, and not to the requisition by the justices to account.

By the militia act, 43 G. 3. c. 47. s. 9., the weekly payments to be made under that act to the families of non-commissioned officers, drummers, and privates, are to be repaid to the overseer of the poor of the parish in which such family reside, by the treasurer of the county in which such parish is situate, and every weekly allowance which shall be so paid to the family of any private man in any other parish than the one for which such private man shall serve, shall respectively be reimbursed in the manner thereafter mentioned.

Sect. 16. provides, that the treasurer who shall reimburse to any overseer any money on account of such weekly allowances, shall deliver or transmit an account of such money as he shall have so reimbursed, signed by justices of the county where such family dwell, to the treasurer of the county, in the militia whereof such private man shall serve; and the treasurer to whom such account shall have been delivered or transmitted, shall forthwith pay to the treasurer who shall have transmitted it the sums so reimbursed to the overseers. Sect. 17. enacts, that the treasurer who shall repay to any treasurer of any other county any such allowances on any such signed account, shall transmit such signed account, and also an account of the monies repaid by him in pursuance thereof, to the justices at the next quarter sessions, and they are to make order for the overseers of the poor of the parish for which the militia-man shall have served, to pay the same to the treasurer:

Held, that, under this statute, it was the duty of the treasurer who reimbursed the overseers' sums of money, on account of the weekly allowance paid to the family of a militia-man serving in the militia of any other county, to transmit an account of the money so reimbursed to the treasurer of the county in the militia whereof such man served; but that it was no part of his duty, after that account had been transmitted, to demand, have, or recover the sum of money so reimbursed from, or take any proceedings at law against, the treasurer of the county to whom that account had been transmitted for obtaining payment

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of the same ; nor was it any part of the duty of such treasurer, after he had transmitted such account, and after neglect of payment by the treasurer of the county to whom it has been transmitted for a reasonable time, to notify and report to the justices at quarter sessions the transmitting of the account, and the neglect of payment thereof ; nor, after the treasurer has paid to the treasurer of another county sums paid by him to the overseer of the poor of a parish in which the family of a militia-man was residing, to obtain an order of sessions for the overseers to pay that sum.

second bearing date 19th of *April* 1814, for the like sum. The defendant craved oyer of the bonds and of the conditions. The condition was in the following terms : — “ Whereas at the general quarter sessions of the peace holden at *Winchester*, for the county of *Southampton*, on the 6th of *April* 1812, before *J. B.*, Esq., *W. C.*, Esq., and others their fellow justices, &c. the above-bounden *George Hollis* was by the said justices nominated and appointed treasurer and receiver of the rates and assessments made for the public services of the said county for the year ensuing, upon his giving sufficient security to *William Dale Farr*, Esq., clerk of the peace of the said county, for the due and faithful execution of the trusts reposed in him, according to the statute in that case made and provided. Now the condition of this obligation is such, that if the above-bounden *G. Hollis*, his executors, &c. shall and do from time to time whenever he or they shall be thereunto required by the justices of the peace assembled at any general quarter sessions of the peace to be held for the said county, or the major part of them, *or by any committee of the said magistrates, duly appointed for that purpose, by any order of the said court of quarter sessions, now made or hereafter to be made*, well and truly account for all and every such sum and sums of money as shall be then in his or their hand or hands, or which shall have been paid to or received by him or them by means or on account of his said office of treasurer ; and also shall and do well and truly pay and apply the money so received by him, or which shall be remaining in his hands at the end of the said year, for which he hath been so appointed treasurer as aforesaid, in such manner and to such persons as the said justices of the peace or
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the major part of them at such general quarter sessions shall direct, order, and appoint; and also if the said *G. Hollis* shall duly and faithfully perform and execute all and every the trusts reposed in him by virtue of his said nomination or appointment to the said offices, then this obligation to be void, or else to remain in full force and virtue." The defendant then pleaded performance of the condition. Oyer was prayed of the second bond and condition, and they were set out. The condition was in the same terms as the first, and general performance was pleaded. Replication, that the defendant after he was so nominated and appointed treasurer and receiver, to wit, on the 6th of *April* 1812, at *Gosport*, did give sufficient security to the said *W. D. Farr*, then being clerk of the peace for the said county, for the due and faithful performance of the trusts reposed in him, according to the statute in that case made and provided, to wit, the said writing obligatory in the first count of the declaration and plea thereto mentioned; and thereupon took upon himself the offices of and became and was treasurer and receiver according to the said nomination and appointment; that afterwards, to wit, on, &c. and on divers other days and times whilst the defendant was such treasurer, divers sums, amounting in the whole to the sum of 1000*l.*, were paid to and received by the defendant by means and on account of his office of treasurer; and that afterwards, to wit, on the 28th of *April* 1813, at, &c. he was required by the justices of the peace, assembled at the general quarter sessions of the peace for the said county, to account for all sums of money before then paid to and received by him by means and on account of his office of treasurer. Breach, that he the defendant refused to account, &c. Second breach,

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breach, that defendant, out of the monies in his hands as such treasurer, did reimburse to the overseers of the poor of the parish of *Portsmouth*, in the said county, &c. in pursuance of the statute in such case made and provided, a sum of 7*l.* 16*s.*, on account of certain weekly allowances before then paid by the overseers of that parish to the family of one *J. Smith*, according to the form of the statute, &c. in such case made and provided; the said *J. Smith*, during all the time for which such allowances were paid, being a private militia-man, serving in the militia of the county of *Monmouth* as a substitute for *John Miller*, of the parish of *Camoy*, in the last-mentioned county, and being embodied and called out into actual service, and having left his said family during all that time dwelling in the said parish of *Portsmouth*, and unable to support itself, to wit, at, &c.: that it was one of the trusts reposed in the defendant by virtue of the said nomination and appointment, and it was the duty of the defendant in that behalf to deliver or transmit to the treasurer of the said county of *Monmouth* an account of the sums of money so reimbursed by him, the defendant, as aforesaid, signed by one or more of the justices of the peace of the county of *Southampton*, and thereafter forthwith to demand, have, and recover the said last-mentioned sum of money from the said treasurer of the said county of *Monmouth*: that the defendant did transmit to the treasurer of the county of *Monmouth* an account of the said sum of money so reimbursed by him, the defendant, as aforesaid, duly signed in that behalf, according to the form of the statute in such case made and provided; yet the defendant, not regarding his duty, &c., did not, nor would forthwith after the transmitting of the said account,

count, or at any other time, *demand, have, or recover*, of and from the treasurer of the county of *Monmouth*, the said sum of money so reimbursed by him, the defendant as aforesaid, although the same might have been so had and recovered in that behalf; but, on the contrary thereof, the defendant wholly omitted and neglected to *demand, have, or recover* the same, contrary to the said trusts so reposed in him as aforesaid, and in breach of the condition, &c. Third breach, that the defendant reimbursed to the overseers of *Portsmouth* a sum of 2*l*. 12*s*., on account of certain weekly allowances paid by them to the family of one *Jones*, and that it was his duty in that behalf to deliver or transmit to the treasurer of the county of *Monmouth* an account of the sum of money so reimbursed, signed, &c.; and in case of neglect of payment of such last-mentioned sum of money to him, the defendant, by the treasurer of the county of *Monmouth*, within a reasonable time after the delivery or transmitting of the account, to cause and procure the *necessary proceedings* at law, to wit, by *action*, to be had and taken against the last-mentioned treasurer, for obtaining payment of the last-mentioned sum of money from the said last-mentioned treasurer to him, the defendant: that the defendant did transmit to the treasurer of the county of *Monmouth* an account of the sum so reimbursed by him, the defendant, duly signed according to the statute in that case made and provided; and although a reasonable time since the transmitting of the said last-mentioned account had long since elapsed, yet the treasurer of the county of *Monmouth* did not nor would pay to the defendant the said last-mentioned sum of money within a reasonable time, or at any other time, but wholly neglected so to do: that the defendant,

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not regarding his duty in that behalf, &c., had not caused or procured the necessary or any proceedings at law to be taken against the treasurer of the county of *Monmouth* for the obtaining payment of the last-mentioned sum, but had wholly omitted and refused so to do, contrary to the trusts so reposed in him as aforesaid, and in breach of the condition, &c., by means, &c. &c. Fourth breach, that the defendant, on, &c. at, &c. reimbursed to the overseers of the poor of the parish of *Portsea*, in the county of *Southampton*, the sum of 1*l.* 4*s.* on account of certain weekly allowances before then paid by the overseers of *Portsea* to the family of one *G. Bowen*; the said *G. Bowen*, during all the time for which such allowances had been paid, being a private militia-man, serving in the militia of the county of the city of *Bristol*, and being called out into actual service, and having left his said family during all that time dwelling in *Portsea* and unable to support itself: that it was one of the trusts reposed in the defendant by virtue of his nomination and appointment as treasurer, and his duty in that behalf, to deliver or transmit to the treasurer of the county of the city of *Bristol* an account of the money so reimbursed by him, &c. &c. as last aforesaid; and in case of neglect of payment of such money to the defendant by the treasurer of *Bristol*, within a reasonable time after the delivery or the transmitting of the said account as aforesaid, to notify and report the said delivery or transmitting of the said account by him, the defendant, and the neglect of the last-mentioned treasurer to the justices of the peace of the county of *Southampton*, at the then next general or quarter sessions of the peace for the said county assembled: that the defendant did transmit
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to the treasurer of *Bristol* an account of money so reimbursed by him, the defendant, duly signed, &c.; and although a reasonable time since the transmitting of the account had long since elapsed, yet the treasurer of *Bristol* did not pay the said sum of money, but wholly neglected so to do: that he, defendant, did not nor would *notify or report to the justices* of the county of *Southampton*, in the then next general or quarter sessions of the peace for the said county assembled, or at any other sessions whatever, the transmitting of the said account by him, the defendant, to the said treasurer of *Bristol*, and the neglect of payment thereof; but, on the contrary, wholly omitted and neglected so to do, contrary, &c. Fifth breach, that before the transmitting of the account to the defendant thereafter next mentioned, to wit, on the 12th of *July* 1812, the treasurer of the county of *Warwick* had reimbursed to the overseers of the poor of the parish of *Nuneaton* in that county, in pursuance of the statute, &c. the sum of 5*l.* 4*s.* on account of certain weekly allowances before then paid by the overseers to the family of one *Austin*, &c., the said *J. Austin* during all the time for which such allowances had been paid as last aforesaid being a private militiaman, serving in the militia of the county of *Southampton* as a substitute for one *Reeves*, of the parish of *Heckfield*, in the county of *Southampton*, and being embodied and called out into actual service, and having left his said family during all that time dwelling in the said parish of *Nuneaton* and unable to support itself: that the treasurer of the county of *Warwick* transmitted to the defendant, being such treasurer as aforesaid, a certain account duly signed, &c.; and the defendant, as and being

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being such treasurer, out of the monies in his hands as such treasurer as aforesaid, then and there paid to the treasurer of the county of *Warwick* the said last-mentioned sum of money; that it was one of the trusts reposed in the defendant by virtue of his said nomination and appointment, and it was the duty of the defendant in that behalf, to transmit such signed account, and also an account of the said monies so repaid by him in pursuance thereof as aforesaid, to the justices of the peace for the county of *Southampton*, at the next general or quarter sessions of the peace for the said last-mentioned county, *in order that the said justices at such sessions might make an order* for the overseers of the poor of the said parish of *Heckfield*, for which the said *J. Austin* so served as aforesaid, to pay the said sum of money to the treasurer of the county of *Southampton*; yet the defendant, not regarding his duty in, &c. did not nor would transmit to the justices of the peace for the county of *Southampton*, at the then next sessions for the said county, or at any other subsequent sessions, such signed account as aforesaid, and also an account of the money so repaid by him as last aforesaid; but, on the contrary thereof, wholly omitted and neglected so to do, contrary to the said trust as aforesaid, and in breach of the condition of the said writing obligatory, and by, &c. &c. The other breaches applied to the second bond. The next upon which any discussion took place was the twelfth, which assigned as a breach of the condition of the second bond, that before the transmitting of the account to the defendant thereafter mentioned, to wit, on the 10th of *October* 1814, the treasurer of *New Sarum* had reimbursed to the overseers of the parish of *St. Edmund's*,
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in the said city, in pursuance of the statute, 2*l.* 12*s.* on account of certain weekly allowances before then paid by the overseers to the family of *J. Brown*, he being a private militia-man, serving in the militia of the county of *Southampton* as a substitute for one *W. Smith* of the parish of *Bishop's Waltham*, in the last-mentioned county: that after the making of the last-mentioned writing obligatory, and whilst the defendant was such treasurer as last aforesaid, to wit, on the 19th *October* 1814, the treasurer of the said city transmitted to the defendant an account, duly signed by one of the justices of the said city, of the sums of money so reimbursed by the treasurer of the said city; and the defendant, being treasurer, paid the last-mentioned sum to the treasurer of the said city, and afterwards transmitted the last-mentioned signed account, and also an account of the monies repaid by him in pursuance thereof, to the justices of the peace of the county of *Southampton*, at the then next general quarter sessions for that county: that it was one of the trusts reposed in the defendant by virtue of his appointment, and his duty in that behalf, to procure an order to be made by the said justices at such sessions for the overseers of *Bishop's Waltham* to pay the last-mentioned sum to the treasurer of the county of *Southampton* within fourteen days after the receipt of such order; yet the defendant did not procure any order to be made at such sessions for the overseers of *Bishop's Waltham* to pay the last-mentioned sum of money to the treasurer of the county of *Southampton*; but, on the contrary, wholly neglected so to do, contrary, &c. and in breach of the condition, &c. To these breaches there was a special demurrer, assigning for cause the points made in argument.

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E. Lawes Serjt. in support of the demurrer. The first breach is bad for not shewing that the defendant was required to account by an order of the court of quarter sessions. The condition of the bond is, that he shall account when required by the justices assembled at sessions, or by the major part of them, or by a committee of magistrates duly appointed for that purpose by any order of the court. The words "by any order of the court" apply to all the preceding part of the sentence. Now, if a plaintiff declare in assumpsit on two considerations, he must aver the performance of both; and if one averment be good, and the other bad, the judgment will be arrested, *Leneret v. Rivett* (a). The statute 12 G. 2. c. 29. ss. 5, 6. confirms this view of the construction of the condition. By section 5. the justices at the quarter sessions are to order and ascertain what proportions of the county rate are to be paid by liberties. By section 6. the high constables are to pay to the treasurer, such treasurer first giving sufficient security in such sums as shall be approved of by the justices (nothing is said about a committee) at quarter sessions, to be accountable for the several sums paid to them in pursuance of the act, and to, &c. The justices cannot delegate their authority to a committee, *Rex v. Townsend* (b). The object of the order of the court of quarter sessions may be to bring the treasurer into contempt. But, secondly, the condition of the bond must be narrowed to the recital. It appears by the recital that the bond was given "according to the statute" (in the singular number) "in that case made and provided," viz. the 12 G. 2. c. 29. s. 6. That con-

(a) *Cro. Jac.* 503.(b) *Bott*, 304.

fixes the condition to the liability imposed on the county treasurer by that statute. The bond is to secure the performance of the duties thereby imposed on the treasurer. He is described in the condition as treasurer and receiver of the rates and assessments for the public service of the county. Those rates and assessments he receives in virtue of that statute. All the breaches assigned, except the first, are in respect of duties imposed by a subsequent act of parliament, viz. the statute 43 G. 3. c. 47. ss. 2. 9. 15, and 16. Cases may be cited to shew that statutes may apply to matters of subsequent creation, but this is a case on the construction of a contract.

Assuming, however, that the bond will apply to duties imposed upon a county treasurer by subsequent statutes, the second, third, and fourth breaches are not well assigned, because the duties supposed in those breaches to attach on the county treasurer are not imposed on him by the statute 43 G. 3. c. 47. The second breach assumes that it is the duty of the treasurer, when the sums paid by him to the overseers of the poor are not reimbursed by the treasurer of the county in the militia of which the man (whose family has been relieved) is serving, to *demand, have, and recover* those sums. The third breach assumes that in such cases it was the duty of the treasurer to cause and procure the necessary *proceedings at law to be taken* against the treasurer of the county in the militia of which the man whose family has been relieved is serving. And the fourth breach assumes that it was the duty of the treasurer not merely to transmit an account, of the sums reimbursed to the overseers of the poor, to the treasurer of the county in the militia of which the man was serving, but in

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case of his neglect to pay the sums so reimbursed within a reasonable time, to notify and report the delivery or transmitting of the account to the justices at sessions. But no such duties are imposed by law on a county treasurer. The only duty imposed on the treasurer by the statute is that of transmitting his account, of the sums reimbursed to the overseers of the poor, to the treasurer of the county in the militia of which the man (whose family has been relieved) is serving. The fifth breach (it must be conceded) does state a breach of duty imposed on the county treasurer by the 43 G. 3. c. 47. s. 17. To the seventh, eighth, ninth, tenth, and eleventh breaches some one of the objections made to the first four breaches applies. The twelfth breach, which applies to the second bond, is bad, because it does not negative the delivery of a signed account. Besides, in all the breaches but the first the plaintiff does not shew a breach of trust, but of duty. The condition of the bond relates to breaches of trust; and case, not debt, is the proper form of action, for the breach of an obligation created by law. Mere omissions are charged. Assuming that breaches of trust are shewn, they are not breaches of trust within the meaning of the condition. It is a well-established rule of construction that subsequent general words are to be restrained by preceding particular words. That being so, the general words "all trusts" must be restrained to trusts reposed in the defendant respecting monies received by him, and for which he is to account.

Dampier contra. The bond, though it purports to be given pursuant to the statute 12 G. 2. c. 29., binds the defendant to the performance of duties imposed on a county

county treasurer by subsequent acts of parliament. There are many instances of statutes affecting matters of subsequent creation. Thus, reliefs of dignities are provided for by Magna Charta. Dignities subsequently created have been held to be within that provision. So costs given by the statute of *Gloucester* are recoverable in actions created by subsequent statutes, 2 *Inst.* 289. So devises to uses are within the statute of uses. So 18 *Elix. c. 5. s. 53.*, which gives costs to defendants in popular actions, extends to other actions subsequently created, *Williams v. Drewe (a)*. The 35 *Elix. c. 5. s. 2.*, which requires a particular venue in penal actions, affects other penal actions since created, *Barber v. Tilson (b)*. An assistant overseer, the creature of the 59 *G. 3. c. 12.*, is subject to the penalties of the 17 *G. 2. c. 3.* *Bennett v. Edwards (c)*. In *Lane v. Cotton (d)* several other cases to the same effect are cited. This is a case on the construction of a statute: for the question is, Whether the duties imposed by the 43 *G. 3. c. 47.* can be affected by a provision in the statute 12 *G. 2. c. 29.*? But, secondly, the bond is not founded on that statute only. The words of the condition follow the words of that statute; but they are general words, and might be adopted in any bond for the performance of the trusts mentioned in the condition, and are sufficiently large to comprehend the duties imposed by the militia-acts upon a county treasurer. If a county treasurer were like a sheriff, so that one could not take nor the other give any but a certain bond, then the general words applying to all cases, would be narrowed to the proper cases. But the

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(a) *Willcs*, 392.(b) 3 *M. & S.* 429.(c) 7 *B. & C.* 586.(d) 12 *M.d.* 485.

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county treasurer is only a receiver. No law excludes a receiver from being bound. He must be bound by the 12 G. 2. c. 29. But he may become bound to perform other trusts and duties. The condition extends to all trusts, and he cannot narrow it to one case. The argument assumes, that a county treasurer can be bound only by a bond given pursuant to the statute. But he may impose a specific obligation upon himself. All the breaches, however, are not of duties created by the militia acts. The first breach is general, and upon that the plaintiff must have judgment, unless it be bad for the cause assigned in the demurrer,—that it does not state that the defendant was required by any order of the Court of Sessions to account. But the condition is in the alternative. The requisition is to be by the justices, or by a committee appointed by an order of sessions. The requisition need not be by an order of sessions. That appears, first, from the structure of the sentence; secondly, from the sense, for the order *must* be future if it were to apply to the requisition. It might be present if it applied to a committee. The order is one now made or hereafter to be made. It cannot, therefore, apply to a requisition. Thirdly, from the relation and juxtaposition of the words, “any committee,” “by any order.” Where the justices alone are mentioned, and the committee are left out, there is no mention of any order. Besides, the words of the condition are the words of the obligor, and are to be construed against him. Then, assuming that the bond applies to duties created by subsequent statutes, the breaches assigned are of duties cast upon the treasurer by the militia-act, the 43 G. 3. c. 47. By s. 2. of that statute, the families of militia-men are to be relieved
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where they are residing. By s. 9., if the relief so given be not given in the county for which the man is serving, it shall be repaid to the overseers according to s. 16., on application to be made by them to the treasurer of the county; and, by s. 16., he is to deliver or transmit an account to the treasurer of the county in the militia of which the man is serving. The second breach for not recovering; the third for not proceeding by law; and the fourth for not notifying to the justices; are breaches of duties arising by implication. By the sections already referred to, the claim is given against the treasurer of the county in the militia of which the man is serving. His demand is (as to privates) against the overseer. By s. 17. he is to transmit his voucher to the justices at sessions, who thereupon allow his account, and make an order on the overseer. Here the defendant has not transmitted such voucher, and that forms the subject of the fifth breach. As to the breaches being founded on neglect of duty, not on breaches of trust; duties and trusts are correlative when the subject is legal. Where a person has to perform a duty created by law, it is trusted he will perform it. If such person is bound to perform his trusts created by law, he is bound to perform that duty. Another objection is, that mere omission is charged; *i.e.* mere neglect of duty. But omission and commission are often convertible terms. The omission of one thing is a commission of another. The omission to transmit the account was the commission of a breach of the condition. The word trusts or duties in a condition implies non-performance as the breach. Then, another objection is, that the word trusts in the condition being mentioned generally, must be referred to those particularly recited, *viz.* trust in

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respect of monies for which the receiver is accountable, and that the breaches charged are of trusts relating to accounts. But accounting is a word of large signification. Any non-payment is a non-accounting. Otherwise an obligor might take the money, and say he duly accounts, when he confesses his default. The defendant is to obtain money and' account, *i. e.* to satisfy. He neglects the means, does not obtain the money, and therefore does not account. Besides, the rule that subsequent general words are restrained by preceding particular words, is not always true. It is a rule of construction only, not absolute but varying according to the expressions and their juxtaposition in the instrument. A covenant contains the words of each party; but a condition contains the words of the obligor, and must be taken most strongly against him. Then, as to the form of action, there has been a breach of the condition of the bond, and, therefore, debt lies. If the defendant has any defence upon the law, he may plead it; if upon the facts, he may take issue. Case might lie on the general obligation created by law. But it does not follow that debt will not lie on the particular obligation of the defendant created by the bond. *Nurse v. Craig (a)* is the converse of this case. There the action was assumpsit. The objection was, that covenant should have been brought. The answer was, that it might have been brought on the particular compact, but that assumpsit would lie on the implied legal contract. That case, therefore, is an authority for case as well as debt. It is no authority against debt; and the opinion of Sir J. Mansfield is an authority for it. The other objection is, that the replication does not shew how the duties

(a) 2 N. R. 148.

arise. The office is created by statute in which the duties are mentioned. The Court will take notice of both. A general averment that it is a man's duty to perform an act which is specially imposed by statute, is sufficient; but where the act is part of a man's general duty, the special circumstances imposing that duty must be stated, *Rex v. Holland (a)*. The reason is, that the Judges take notice of statutes; and it would be useless to mention duties which are known.

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BAYLEY J. This was an action of debt brought on two bonds given by the treasurer of the county of *Southampton* to the clerk of the peace, and various breaches of the conditions are assigned in the replication. The first breach is, that the defendant, while treasurer, received sums of money; that he was required by the justices assembled at the sessions to account, but did not do so. The objection taken to that breach was, that it was not stated that he was required to account by an order of the court of quarter sessions; it being contended, that, according to the true construction of the condition, it was essential that he should have been required by an order of that court. But it seems to me that that cannot be the true construction of the language used in the condition. The quarter sessions certainly have the power of requiring this to be done by an order, but a committee have no such power. They cannot make an order of the court of quarter sessions. The words, "by an order of the said court of quarter sessions," must, therefore, apply exclusively to the appointment of a committee, and then the construction of the bond will

(a) 5 T. R. 619.

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be, that the treasurer is to account when he is required so to do by the justices or by a committee duly appointed for that purpose by order of the court of quarter sessions. That disposes of the objection made to the first breach. That breach is therefore good.

There were other breaches of duties supposed to be cast on the defendant by the militia acts. These breaches stated in substance, that the defendant, as treasurer, was obliged to pay certain sums of money under the militia acts, and that he had not taken proper steps in order to get the county reimbursed the monies which he had from time to time so paid. It was objected to all those breaches, that though the bond was framed in general terms, so as to be applicable to whatever were the trusts reposed in the party at the time when it was executed, yet that inasmuch as the 12 G. 2. c. 29. required that a security framed in this language should from time to time be given by the treasurer, it would apply to such duties only as were in existence at the time when that statute passed, and not to duties created by subsequent statutes. I am of opinion that the bond will apply to all duties which a county treasurer was bound to perform at the time when the bond was given. The bond speaks at the period of time at which it was executed. If an attempt had been made to charge the obligor with sums of money received in discharge of duties imposed on him subsequent to the date of the bond, I should have thought that the bond could not have extended to such duties. But as to duties in existence at the time when the bond was made, the language of the bond is quite sufficient to cover them; and looking at the general language in which the condition is conceived, it would be

be unreasonable to confine it to the duties imposed by the 12 G. 2. c. 29. If it had been intended so to confine it, it might easily have been done by using the words "he shall account for all such sums of money as he shall receive," or "perform all such trusts as are reposed in him by virtue of the 12 G. 2. c. 29." But the language being general, the bond must be considered as speaking at the period of time at which it was made, and as applying to all sums of money at that time receivable, and to any trusts at that time reposed in the party by virtue of any acts of parliament then in force. I am, therefore, of opinion, that it applies to duties imposed on the defendant by the militia acts.

Then we are to see whether the defendant has omitted to perform any of these duties, and, consequently, whether any of the breaches which are assigned in that respect are well assigned. The militia act relied upon, is the 43 G. 3. c. 47., of which the sections 9. 16. and 17. are material. The ninth section directs that the weekly allowance to be paid under that act to the families of any non-commissioned officer or drummer, shall be repaid to the overseers of the poor of the parish in which such family was relieved by the treasurer of the county in which such parish is situate, out of the public stock; and every weekly allowance so paid to the family of any non-commissioned officer or drummer in any other county than that for which he shall serve, or to the family of any private man in any other parish than the one for which such private man shall serve, shall respectively be reimbursed in the manner thereafter mentioned. The sixteenth section provides, that the treasurer who shall reimburse to the overseers any sums of money in pursuance of the act, on account of such weekly

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weekly allowance paid to the family of any non-commissioned officer or drummer, or any private militia-man serving in the militia of any other county, shall transmit an account of such money so reimbursed, signed by one or more justice or justices of the peace for the county where such family shall reside, to the treasurer of the county in the militia whereof such non-commissioned officer, drummer, or private militia-man shall serve, and thereupon the treasurer "to whom such account shall have been transmitted, shall forthwith pay to the treasurer who shall have so transmitted such account, the sums so by him reimbursed to the overseers, and shall be allowed the same in his accounts." The seventeenth section provides, that every treasurer of a county who shall repay to any treasurer of any other county any such allowances on any such signed account, shall transmit such signed account, and also an account of all monies so repaid by him in pursuance of this act, to the justices of the peace for the county at the next quarter sessions of the peace, or any subsequent sessions, and they shall forthwith order the overseers of the poor of the respective parishes for which such militia-man shall have served, to pay the same to the treasurer of such county within fourteen days after the receipt of such order." The 53 G. 3. c. 81. s. 10. makes the treasurer to whom such account has been transmitted (if no objection be made to it within three months) liable to pay this amount, and gives a remedy by way of penalty in case there be a neglect to make such payment within the period therein mentioned. But in my view of the subject, nothing turns on that act of parliament. The second and third breaches describe it as being part of the duty

duty of the treasurer of the county, after he has transmitted the account, of the money reimbursed to the overseers, to the treasurer of the county in the militia whereof the man served, either to demand and recover, or to take proceedings by way of action for the recovery of such money. Now there being no directions in any of the acts that the treasurer shall take the proceeding, which proceeding would be attended with expence, I am of opinion that those breaches cannot be sustained. The fourth breach is, that the defendant reimbursed the overseers of *Portsea* a sum of 1*l.* 4*s.*, paid by them on account of a weekly allowance paid to the family of one *Bowen*, who was a substitute militia-man in the militia of the city of *Bristol*. That breach alleges that it was one of the trusts reposed in the defendant, by virtue of his nomination and appointment as treasurer, and his duty in that behalf, to deliver or transmit to the treasurer of the said county of the city of *Bristol* an account of the said sums of money so reimbursed by him, and in case of neglect of payment of such money to him the said defendant by the treasurer of the county of the city of *Bristol*, within a reasonable time after the delivery or the transmitting of the said account as aforesaid, to *notify and report* the said delivery, or transmitting of the said account by him the defendant, and the neglect of the last-mentioned treasurer as aforesaid, to the justices of the peace of the said county of *Southampton* at the next general or quarter sessions of the peace for the said county assembled. Now, the duty of transmitting is clearly pointed out by the act of parliament, but not the duty of notifying and reporting: and, therefore, unless it becomes a common law obligation on him to make this notification and report,

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port, he will have done all that the act of parliament requires that he should do by merely transmitting. There was clearly no common law obligation on him to make this notification. But the county, when they come to pass the treasurer's account, and find that he has not been reimbursed that sum, may either take proper steps to get it reimbursed by the treasurer, who ought to reimburse it, or may proceed by way of action on the 53 G. 3. c. 81. s. 10., in order to enforce payment of the penalty which that treasurer will have forfeited by neglecting to make such payment in the way in which he ought.

The fifth breach is good. It states that the treasurer of the county of *Warwick* reimbursed the overseers of *Nuneaton*, in that county, 5*l.* 4*s.*, on account of weekly allowances paid to the family of one *Austin* (he being a private militia-man serving in the militia of the county of *Southampton*, as a substitute for *Robert Reeves*, of a parish in the county of *Southampton*); that the defendant having repaid the treasurer of the county of *Warwick*, it was his duty to have transmitted his account to the following sessions, that they might make an order for the reimbursement of the county upon the overseers of the parish. That duty is undoubtedly imposed on the defendant by the 43 G. 3. c. 47. s. 17. That was therefore a breach of the condition whereby he agreed to execute all the trusts reposed in him. The sixth and seventh breaches (which apply to the second bond) are the same as the second and third to the first. The eighth and ninth are for not notifying and reporting. The ninth, tenth, and eleventh, are all open to one of the objections which apply to the fourth. The twelfth breach charges, that the treasurer of the city of *New*

Sarum

Sarum had reimbursed the overseers of a parish in that city 2l. 12s., on account of weekly allowances paid by them to the family of one *James Brown*, a private militia-man, serving in the militia of the county of *Southampton*, as a substitute for one *W. Smith* of *Bishop's Waltham*; that the treasurer of *New Sarum* transmitted to the defendant an account, signed by the justices, of the sum so reimbursed, and the defendant paid him those sums, and transmitted such account to the justices of *Southampton* at the next quarter sessions. It then alleges, that it was one of the trusts imposed upon the defendant to procure an order to be made by the said justices for the overseers to pay the said sum of money, but that he neglected so to do. Now the act of parliament does not throw upon him the onus of getting such order: it does not even compel him to attend at the sessions, but merely to transmit his account to enable the justices to make the order. The statute does not even say to whom that order is to be delivered; it merely provides that he shall transmit his account, and that he has done. And then the sessions are forthwith to order the overseers of the poor of the parish for which the man serves to pay. I am of opinion, therefore, that that breach is not well assigned. Upon the whole, then, I am of opinion that the plaintiff is entitled to judgment on the first and fifth breaches, and the defendant on all the others.

LITLEDAL J. I am of the same opinion. The first question is, Whether the bond being given for (among other things) the performance of the trusts of the office, (which word trusts means the same thing as duties) is sufficient to extend to new obligations thrown on the
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county treasurer since the passing of the statute 12 G. 2. c. 29. That act directs that the county treasurer shall give sufficient security, in such sums as shall be approved of by the justices at sessions, to be accountable for the several sums paid to him in pursuance of that act; and to pay such sums as shall be ordered to be paid by the justices in quarter sessions, and for the due and faithful execution of the trusts reposed in him. It has been contended, that this being a statutable bond applies only to trusts and duties which attached to the office of county treasurer at the time when that act of parliament passed. I am of opinion that it extends to new obligations thrown on the county treasurer since that statute. Several cases have been cited to shew that acts of parliament will apply to matters of subsequent creation. So an immemorial custom will embrace matters arising within the time of legal memory. By ancient immemorial custom all the officers of the Court of Chancery daily attendant on the Court are exempted from serving offices. It was holden in *Wilkes v. Williams* (a), that the privilege extended to offices created within the time of legal memory. And Lord *Kenyon* then referred to *Rex v. Warner* (b), where a privilege for custom-house officers to be exempted from serving office was holden to exempt them from the office of overseer of the poor, though it was there objected that that was an office created by statute within the time of legal memory. Upon the same principle the security required to be taken from the county treasurer by the statute 12 G. 2. c. 29. will extend to trusts or duties imposed on that officer since the statute passed. If by any subsequent act of parliament a percentage had been allowed to the treasurer upon all sums

(a) 8 T. R. 632.

(b) 8 T. R. 375.

which

which he should pay under those acts, he would have been benefited by such enactment, for the office would thereby have been rendered more profitable; and if so, he ought to bear the burden resulting from such new duties. The condition of the bond recites, that he was to give his bond for the due discharge of the trusts reposed in him according to the statute. The words of the condition, though more extensive in their import than those in the recital, follow the language of the 12 G. 2. c. 29. The condition extends, however, to one thing not expressly mentioned in the statute, viz. the paying over sums of money at the end of the year; but that is immaterial, for the statute requires the county treasurer to give security for the performance of the trusts of his office. Then as to the objection taken to the first breach, I think that it was not necessary, according to the true construction of the condition, that the defendant should have been required to account by an order of the court of quarter sessions. The words "by any order of the court of quarter sessions now made or hereafter to be made," apply to the words immediately preceding them, and not to the whole of the sentence. They are placed in such a part of the sentence that they may apply to one or the other. The context shews, however, that they apply to what immediately precedes. It is a well-established rule of construction, that all clauses in acts of parliament as well as contracts must be so construed as to give effect to every word, if possible. Now if the words, "by any order of the court of quarter sessions," were construed to apply to the requisition by the justices, the other words, "by any committee appointed for that purpose," would have no effect whatever. For according to that construction the

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the requisition might be by an order of justices at sessions, or the major part of them, or by a committee appointed for that purpose. Now it is quite clear that a committee of justices cannot make an order of court. That being so, I think that the words, "by an order of the court of quarter sessions," apply only to the words immediately preceding, "a committee appointed for that purpose;" and consequently that the breach is well assigned. I agree with my Brother *Bayley*, that the fifth breach is also good, and that the others cannot be sustained, because it is not the duty of a county treasurer, after he has transmitted the account required, to bring an action to recover the money reimbursed, or to report or notify to the next quarter sessions the neglect of payment by the treasurer of the county to whom the account has been transmitted. The plaintiff is entitled to the judgment of the Court on the first and fifth breaches, and the defendant on all the others.

PARKE J. I concur in opinion with the rest of the Court that the plaintiff is entitled to judgment on the first and fifth breaches. Two objections were taken to these two breaches. The first is, that in order to compel the treasurer to account, it is necessary there should have been an order of justices at sessions. That depends entirely on the construction to be put on the condition of the bond. It appears to me impossible that the words, "by order of the said court of quarter sessions," can refer to all the antecedent matter. It is impossible that a committee of magistrates duly appointed could make an order of sessions to account. Those words, therefore, can have no reference to a requisition by the justices of the peace assembled at quarter

quarter sessions. They can apply only to the constitution of the committee; but if the other be the true meaning of the words of the condition, then it is implied in the words in which the breach is assigned, (for they are the very words of the condition,) that the defendant was required to account by the justices of the peace. If issue had been taken on that breach (if that be the true meaning of the words), on the trial of that issue the plaintiff must have proved a requisition by order of the court. It was not necessary to state that the justices did require by a regular order of the court. It appears to me, therefore, that in either view the first breach is well assigned.

With respect to the second, third, and fourth breaches, they appear to me not to be well assigned; for the duties there supposed to be cast on the treasurer do not appear to be cast on him by express words or necessary implication in any act of parliament. I think the bond applies to duties imposed by the acts of parliament passed subsequent to the 12 G. 2. as well as to duties imposed by that act. It has been contended that the condition by the recital is tied up to duties imposed by that act. That recital is in words which are ambiguous. It states that he has been called upon to give a bond for the due and faithful execution of the trusts reposed in him according to the statute. The words "according to the statute" may either apply to the giving of the bond or to the trusts reposed in him. But when we look at the terms of the condition, all doubt that might arise from the recital is removed, for that in general terms obliges him to perform and execute all and every the trusts reposed in him by virtue of the said nomination or appointment, viz. the trusts reposed in him by

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law; or, in other words, the duties cast on him by law at the time that bond was given. All those duties are cast on him by act of parliament; but the bond, for the reasons I have given, appears to me to apply to the trusts reposed in him, or the duties cast on him by subsequent acts, as well as by the 12 G. 2.

Then we are to see if the 43 G. 3. c. 47. or the 53 G. 3. c. 81. does cast on the treasurer those duties which are described as being his duties in the different breaches assigned. Now they are sought to be implied from the ninth and sixteenth sections of the former act. The ninth section provides that when the overseers of the poor of any parish have relieved the family of a private militia-man, they are to be repaid by the treasurer of the county in which such parish is situate, and the treasurer of the county is to be reimbursed in the manner thereafter mentioned. The manner after mentioned, which is in section 16., is that the treasurer who shall reimburse to any overseer any sum of money on account of such weekly allowances paid to the family of a private militia-man serving in the militia of any other county, shall deliver or transmit an account of such money as he shall have so reimbursed to the treasurer of the county in the militia whereof the man shall serve, and thereupon the treasurer to whom such account shall have been delivered or transmitted shall be required to pay to the treasurer who shall have so delivered or transmitted such account the sum so reimbursed to such overseer." It does not point out prospectively any thing that is to be done by the treasurer if the act is not complied with. All the duty which the law implies in such a case is that, inasmuch as he is to be reimbursed, he is to use
due

due diligence to be reimbursed according to the circumstances of the case. The 2d, 3d, and 4th breaches assigned are in respect of duties supposed to arise by implication from the statute. But it is impossible to say that it was his duty to commence an action or to give notice to the next sessions, or to demand and recover in the words in which those breaches are assigned. The same objection applies to all the subsequent breaches except the fifth, which I think good, for the reasons already assigned by the Court. The 53 G. 3. c. 81. s. 10., imposes a penalty upon a treasurer neglecting to make such repayments as above mentioned, but does not impose any new duty upon the treasurer to whom the payments are to be made. For these reasons I am of opinion that the plaintiff is entitled to judgment on the first and fifth breaches, and that the defendant is entitled to judgment upon all the others.

Judgment for the plaintiff on the first and fifth breaches, for the defendant on the other.

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See. Doc. dem. With. v. Hamden & B. ad l. hoc

DOE on the joint and several demises of the
Rev. H. D. BROUGHTON and D. W. STOW
against JOHN GULLY.

A rector, in 1814, and after the 15 *Eliz.* c. 20. had been repealed, in consideration of 600*l.*, granted, bargained, and sold the rectory and glebe lands, and all tithes, &c. for 100 years, to the grantee of an annuity for securing the same. After the passing of 57 *G. 3.* c. 99., by deed, reciting the grant of the annuity, and that *A. B.* had agreed to lend the rector 600*l.* to enable him to redeem the annuity, the grantee of the same, in consideration of 600*l.*, by direction of the rector, assigned to *A. B.* the 600*l.* by him paid for the purchase of the annuity, and the term, and the rector confirmed to *A. B.* the rectory for that term, for the purpose of securing the repayment of the sum advanced by him to redeem the annuity, as well as other sums:

EJECTMENT. At the trial before *Burrough J.* at the Spring assizes for the county of *Surrey* 1828, a verdict was found for the lessors of the plaintiff, subject to the opinion of this Court on the following case: —

On the 10th of *August* 1811, the Rev. *Bryan Broughton* became rector of the rectory of *Long Ditton*, in the county of *Surrey*, and being such rector, by an indenture bearing date the 6th of *January* 1814, made between him of the one part, and *William Bonnell James* of the other part, in consideration of the sum of 600*l.*, he granted to *W. B. James* an annuity of 88*l.* 7*s.* for ninety-nine years, if he *B. Broughton* should so long live, charged upon the rectory of *Long Ditton*, with the usual power of distress and clause of repurchase, and with covenants on the part of the said *B. Broughton*, that the rectory should continue subject to the annuity as long as it was unpaid, and that he would not resign without the consent of *W. B. James*; and, for better securing the annuity, *B. Broughton* did grant, bargain, sell, and assign unto *W. B. James*, his executors, administrators, and assigns, all the rectory of the parish and parish

Held, that inasmuch as the term was created after the passing of the 43 *G. 3.* c. 84., which repealed the 15 *Eliz.* c. 20., against charging benefices, the assignment of it for the purpose of securing the money paid as the consideration for the annuity, was valid, and vested the legal estate in *A. B.*, although made after the 57 *G. 3.* c. 99., which, perhaps, revived the 15 *Eliz.* c. 20. so far as related to charges upon benefices.

church

church of *Long Ditton*, and the glebe lands, tithes, oblations, obventions, and other the rights, members, and appurtenances thereof; to hold the same unto *W. B. James*, his executors, &c. from the day next before the date of the indenture for the term of 100 years then next ensuing, if *B. Broughton* should so long live and continue to be rector of the said rectory, without impeachment of waste, so far as *B. Broughton* could grant that privilege, upon trust for the better securing to *W. B. James*, his executors, &c. the due and regular payment of the annuity. And which said deed was indorsed as follows:—"A memorial of this deed was enrolled in his majesty's High Court of Chancery, pursuant to an act of parliament made for that purpose."

(Signed)

"J. MITFORD."

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By a certain other indenture, bearing date the 1st of *June* 1815, made between the same parties (with a like indorsement thereon as to the enrolment), in consideration of the sum of 1000*l.*, the said *B. Broughton* granted to *W. B. James* another annuity of 151*l.* for ninety-nine years, if he *B. Broughton* should so long live, charged upon the rectory, and with the like clauses, powers, and provisions as in the indenture of the 6th of *January* 1814; and for the better securing the last-mentioned annuity, and in consideration of 10*s.*, *B. Broughton* granted, bargained, sold, and demised to *W. B. James*, his executors, &c. all the rectory and premises contained in the before-mentioned indenture of the 6th of *January* 1814, to hold the same from the day next before the day of the date of the now reciting indenture for 100 years, if *B. Broughton* should so long live and continue to be rector of the said rectory, upon

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trust for better securing the last-mentioned annuity.

By another indenture, dated the 26th of *October* 1816, made between the said parties (with a like indorsement thereon as to the enrolment), in consideration of 400*l.*, *B. Broughton* granted to *W. B. James* another annuity of 60*l.* for ninety-nine years, if he *B. Broughton* should so long live, charged upon the said rectory; and for better securing the same, *B. Broughton* ratified and confirmed to *W. B. James*, his executors, &c. all the rectory and premises particularly described in the before-mentioned indentures, to hold the same for the residue and remainder of the term of 100 years, granted by the indenture of the 1st of *June* 1815, upon further trust for securing the last-mentioned annuity of 60*l.* No proof was given of the enrolment of the memorials of the three several annuities or rent charges, further than the indorsements upon the deeds as before mentioned. These annuities being unredeemed, and the terms created for securing them being still subsisting, by an indenture bearing date the 26th of *May* 1820, made between *B. Broughton* of the first part, *W. B. James* of the second part, and *W. B. Broughton*, a captain in the navy, of the third part, reciting the before-mentioned indentures of the 6th of *January* 1814, the 1st of *June* 1815, and the 26th of *October* 1816; and that *B. Broughton* was indebted to the said *W. B. Broughton* in the sum of 1000*l.*, secured by three bonds, dated respectively the 6th of *April* 1815, the 14th of *January* 1817, and the 28th of *August* 1817, and in the sum of 1000*l.* lent by the said *W. B. Broughton* to *B. Broughton* in the month of *January* 1819, for which no specific security was given; and that *W. B. Broughton* had agreed to lend *B. Broughton* the further sum of 3500*l.*, in
order

order to enable him to redeem the said annuities, and for his other occasions, in consideration of 2000*l.* paid to *W. B. James*, of 2000*l.* due to *W. B. Broughton*, and of 1500*l.* advanced and paid to *B. Broughton*, making together the sum of 5500*l.*, the said *W. B. James*, at the request and by the direction of *B. Broughton*, did bargain, sell, and assign unto *W. B. Broughton*, his executors, &c. all the sums of 600*l.*, 1000*l.*, and 400*l.*, the purchase-money of the said three annuities; and for the consideration aforesaid, the said *W. B. James* did bargain, sell, and assign, and *B. Broughton* did grant, bargain, sell, and assign, ratify and confirm unto *W. B. Broughton* all the said rectory of the said parish and parish church of *Long Ditton*, and the messuage or tenement and rectory-house, glebe lands, tithes, profits, and emoluments whatsoever belonging to the rectory; and all other the premises by the said recited indentures, or any of them, granted and demised, with their and every of their rights, members, and appurtenances, to hold the same unto *W. B. Broughton* for and during all the residue and remainder of the term of 100 years then to come and unexpired, if *B. Broughton* should so long live and continue incumbent of the rectory; subject, nevertheless, to a proviso for redemption and re-assignment of the said terms, upon payment of 5500*l.* and interest on the 26th of *November* then next. Captain *W. B. Broughton* died on the 17th *March* 1821, having by his will and codicil, duly proved in the prerogative court of *Canterbury* on the 23d *May* 1821, appointed the lessors of the plaintiff his executors.

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Thesiger for the plaintiffs. The question is, Whether the terms created by the annuity deeds passed by the

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deed of 1820 to *W. B. Broughton*? The first and the most important question is, Whether the statute 13 *Eliz. c. 20.* applies to and avoids all chargings of benefices with cure; or, whether it is not confined to a particular description of charges obviously within its operation? The preamble of that statute recites, "that the livings appointed for ecclesiastical ministers may not by corrupt and indirect dealings be transferred to other uses;" and then enacts, "that no lease of any benefice with cure shall endure any longer than while the lessor shall be ordinarily resident, and serving the cure of such benefice without absence for eighty days in any one year; but that every such lease, so soon as it shall come to any possession or use above forbidden, or immediately upon such absence, shall cease and be void; and that all chargings of such benefices with cure hereafter with any pension, or with any profit out of the same, shall be utterly void." The intent of that statute, which is to be collected from the preamble, was to prevent corrupt bargains between the patron and incumbent, the mischief being, that a needy incumbent would, in consideration of being presented by the patron, grant beneficial leases, or charge the benefice with a pension or profit to the patron, or some of his dependants, *Mourys v. Leake* (a), *Burn's Ecclesiastical Law*, tit. *Leases*, 394. This view of the object of the legislature is enforced by the subsequent statute of 14 *Eliz. c. 11.*, which recites, that sundry *evil-disposed* persons had defrauded the true meaning of the before-mentioned statute by bonds and covenants which were not taken to be leases, although they amounted to as much. It is clear, from the expressions

(a) 8 T. R. 415.

used, that these provisions of the acts were directed against corrupt and indirected dealings with the living only. This is not a case of that kind. Here the incumbent merely charged on the living annuity interest on a sum of money *bonâ fide* advanced to him. This is not a case, therefore, within the mischief recited in the preamble, or within the intent of the legislature. It will be said that all chargings are void, because, by the first part of the clause, all leases are avoided by non-residence. But there the non-residence is made evidence of the original contract being corrupt. It may also be said, that the words of the enacting part of the clause are general, and are not to be limited to a particular description of charge. The general words of the enacting part, construed according to the intent of the legislature, must be restrained to the mischiefs recited in the preamble; and they ought to be so construed according to the rule given in *Reniger v. Fogossa* (a). This point has never been expressly decided, though it was mentioned in *Mouys v. Leake* and *Doe v. Mears* (b). [Bayley J. The last case shews that the statute is not confined to corrupt bargains. The lease, which was granted to secure an annuity, was held to be void.] But that was on the ground that the incumbent did not reside. The marginal note in *Mouys v. Leake*, that the grant of a rent-charge out of a benefice is void, is not warranted by the judgment. In that case it was argued, that by the statute the profits of benefices could not be charged or taken for payment of debts. But in answer, Lord Kenyon said, "If that be so, what is to become of the whole process *de bonis ecclesiasticis*?" No in-

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(a) *Plowd. Rep.* 10.(b) 1 *Cowp.* 129.

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convenience will result from restraining the statute of *Elizabeth* to corrupt dealings. By construing it so as to avoid all chargings, a meritorious and not in general affluent body of men will be deprived of the means of raising money for the exigence of their families, by taking away from them the only security they can offer. If the object of the statute were to avoid all chargings, then it is necessary to consider whether it has rendered them void or voidable. For of a void act a stranger may take advantage, but not of a voidable one, *Humphreston's case* (a). This point must be noticed, because in *Doe v. Somerville* (b) it was stated and agreed arguendo, that the grant of an annuity was valid during the life of the incumbent against him and all claiming under him; and *Co. Litt.* 45. was cited, where Lord Coke, commenting on the statute of 13 *Eliz.*, which made all leases other than for three lives utterly void, observes, that leases not warranted by the act are not void, but good against the lessor, because the statute was made for the benefit of the successor. But the statute of 13 *Eliz. c. 20.* was made for the benefit and protection of the incumbent, and, therefore, it must be admitted, that if this be a case within that act, the charge is not good even during the life of the incumbent. It has been held, that a rector may even take advantage of his own wrong to avoid such a lease, *Frogmorton v. Scott*, (c) or a stranger, *Doe dem. Crisp v. Barber* (d). If the charging, therefore, be void, it is agreed that the defendant may take advantage of it. But, secondly, the statute 13 *Eliz. c. 20.* is wholly repealed. It was undoubtedly repealed by 43 G. 3. c. 84.; but that statute was again repealed by

(a) 2 *Leon.* 218.(b) 6 *B. & C.* 126.(c) 2 *East*, 467.(d) 2 *T. R.* 749.

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the 57 G. 3. c. 99., which, however, in terms repealed the 13 Eliz. c. 20. [*Parke J.* The 57 G. 3. c. 99. repealed so much of the statute of *Elizabeth* as relates to spiritual persons holding of farms, and to leases of benefices and livings, and to buying and selling, and to residence of spiritual persons on their benefices. But so much of that statute as relates to the charging of benefices (a), seems to be revived by the 57 G. 3. c. 99.] The terms for securing the three annuities were created at a time when the 13 Eliz. c. 20., having been repealed by the stat. 43 G. 3. c. 84., had ceased to have any operation whatever. The deeds by which those terms were created constituted a valid charge upon the living, *Doe v. Somerville*. And if that be so, then the deed of 1820, so far as it operates to continue those charges, is a valid deed, and passes the legal estate. If *James* had kept the terms in himself, they would have been operative. They must, therefore, continue so, though he has assigned them to another for a valuable consideration. It was not necessary to prove a memorial, *Doe dem. Griffin v. Mason* (b), *Doe dem. Lewis v. Bingham* (c).

Chitty, contra, was desired by the Court to confine himself to the last point. The statute 13 Eliz. c. 20. makes all charges whatever void. The object of that statute was to secure a decent support to the clergyman. That object will be defeated if he may anticipate the profits of the living, and assign them as a security for the payment of annuities. The living appointed for an ecclesiastical minister will thereby be transferred to other

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(a) See *White v. Bishop of Peterborough*, 3 Swanst. 109. note.

(b) 3 Comp. 7.

(c) 4 B. & A. 672.

uses,

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uses, which is the mischief mentioned in the preamble. The deed of 1820 being made in contravention of the object of the statute, a court of law will not give effect to it. A new charge is created by that deed, because the benefice is for the first time charged with a sum of 3500*l.* in addition to the 2000*l.* charged by the former deeds. To that extent it is clearly void, and being void in part, it is void altogether. [*Littledale J.* Suppose the deed had not secured the 3000*l.*, but that *B. Broughton*, being desirous to redeem the annuities, had borrowed 2000*l.* of his brother, and that the term had been assigned to the latter by *James*; that would have been a valid assignment. And if so, is this assignment void because the deed contains also a new charge? The statute does not avoid the securities, but prohibits the charging of benefices with any pension. The case may be considered as if these three annuities had been charged upon the benefice before the statute 13 *Elix. c. 20.* had passed, and the term had been assigned afterwards. Then, as that statute did not avoid the securities, the deed would be valid so far as it did not create a new charge.] The whole deed is void, because the object of it is to support a charge in contravention of the act of parliament. It is clearly void in part, so far as it creates a new charge; and being void in part, is void altogether.

Thesiger, in reply, referred to *Butler v. Wigg (a)*, and the authorities there cited, to shew that where an act of parliament does not avoid securities, (which contain

(a) 1 *Saund.* 65. note (d), last edition.

matter contrary to the act), so much only of such securities as is contrary to the act will be avoided, and the rest will be good.

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Dor dem.
Baughton
against
Gully.

BAYLEY J. This was an ejectment brought to recover the possession of the rectory of *Long Ditton*, in the county of *Surrey*. It appears from the facts stated in the case, that the Rev. *B. Broughton*, being rector of *Long Ditton*, on the 6th of *January* 1814, in consideration of 600*l.* granted to *W. B. James* an annuity of 88*l.* 7*s.* for ninety-nine years, if he *B. Broughton* should so long live, charged upon the rectory. And for better securing the annuity, *B. Broughton* assigned the rectory to *James* for 100 years, if he should so long live and continue rector. In 1815, in consideration of 1000*l.*, the Rev. *B. Broughton* granted to *James* another annuity of 151*l.*, charged upon the rectory; and for better securing that annuity, assigned the rectory to *James* for the term of 100 years, if he should so long live and continue rector. And by indenture of the 26th of *October* 1816, in consideration of 400*l.*, he *B. Broughton* granted *James* another annuity of 60*l.*, charged upon the rectory; and for better securing the same, confirmed to *James* the rectory for the residue of the term of 100 years granted by the deed of the 1st *June* 1815. After the execution of this deed, the rectory was therefore charged with the payment of annuities amounting altogether to 299*l.* 7*s.* These annuities were charged upon the rectory at a time when the statute 13 *Eliz. c. 20.* was not in operation. It had been repealed by the statute 43 *G. 3. c. 84.* Assuming that the statute 13 *Eliz. c. 20.* has the effect of preventing the charging of all benefices with cure with annuities granted bona fide for a valuable consideration—

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Broughton
against
Geller.

consideration, it was not in operation at the time when the annuities were charged on this rectory. In 1817, the 43 G. 3. c. 84., and part of the 13 *Eliz. c. 20.* were repealed by the 57 G. 3. c. 99. The residue of the statute 13 *Eliz. c. 20.* was therefore revived. After such repeal, by indenture made in 1820, between *B. Broughton, W. B. James, and W. B. Broughton*, reciting the before-mentioned indentures, and that *B. Broughton* was indebted to *W. B. Broughton* in the sum of 1000*l.*, secured by bond; and in another sum of 1000*l.* for which no specific security had been given; and that he had agreed to lend the said *B. Broughton* the further sum of 3500*l.*, to enable him to redeem the annuities; and for his other occasions, in consideration of 2000*l.* paid to *W. B. James*, of 2000*l.* due to the said *W. B. Broughton*, and of 1500*l.* paid to *B. Broughton, W. B. James*, at the request of *B. Broughton*, assigned to *W. B. Broughton* all the sums of 600*l.*, 1000*l.*, and 400*l.*, the purchase-money of the said three annuities; and the said *W. B. James* bargained, sold, and assigned, and the said *B. Broughton* granted, bargained, sold, assigned, ratified, and confirmed unto *W. B. Broughton* all the rectory of *Long Ditton*, habendum for the residue of the term of one hundred years. It was insisted that the assignment of the term having been made since the passing of the 57 G. 3. c. 99. which revived the 13 *Eliz. c. 20.*, as to charges upon benefices, was an invalid security because it created a new charge. If the deed merely created a new charge, it would become necessary to decide whether the 13 *Eliz. c. 20.* applied to annuities for valuable consideration, and charged upon benefices with cure; but if the deed did not merely create any new charge, but continued an old one

one made upon the rectory during the period when the 13 *Eliz.* c. 20. had ceased to be in force, it will be unnecessary to decide that question. It seems to me quite clear, that the deed, so far as the assignment of the term is concerned, did not create any new charge upon the rectory; and if it be a valid deed to any extent, the lessors of the plaintiff are entitled to recover possession. Now at the time the deed was executed, there were subsisting charges upon the rectory amounting to the sum of 299*l.* per annum. That sum was annuity interest upon 2000*l.* advanced to *B. Broughton*. The effect of the deed was to put an end to the annuity interest, and substitute common interest. It contained an assignment of the principal sums advanced by *James* to *W. B. Broughton*, and an assignment by *James* and *B. Broughton* of the rectory to *W. B. Broughton*. The whole consideration for that assignment passed from *W. B. Broughton*. If the term would be a good valid security for the annuity interest, it would be equally so for common interest at the rate of 5 per cent; and if it be a valid security for 5 per cent interest on the first sum advanced, upon which annuity interest was reserved, the legal estate passed by the assignment, and is now in the lessors of the plaintiff. The substance of the deed being to substitute common interest for annuity interest on the sum originally advanced, the assignment is, pro tanto, a mere continuation of the old charge: the legal estate, therefore, passed by the deed to *W. B. Broughton*, and is now in the lessors of the plaintiff. The judgment of the Court must therefore be for the plaintiff.

Judgment for the plaintiff.

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—
Dox dem.
Broughton
against
GULLY.

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C. HARVEY, W. REYNOLDS, and other Plaintiffs,
against Sir W. KAY, Bart.

By a deed, whereby a joint stock company was established, any shareholder desirous of transferring his shares was to give notice at the office of the company that he had agreed to sell the shares, and no person who purchased shares was to be deemed a proprietor until he executed the deed. The directors, on notice of the transfer of any shares (made in conformity to the rules of the company) were to cause the transfer to be registered in the books of the company. Every person by whom such shares were transferred was immediately after such

transfer was registered in the books of the company, to cease to be a proprietor. In an action, in which the plaintiff sought to charge the defendant, as a member of the company, for goods sold, &c., the letters of the plaintiff, in which he admitted himself to be a shareholder on the 30th of March 1826, were held to be proof of that fact, although it was not proved that he had ever executed the deed; secondly, there being no proof of any actual transfer of the shares to a purchaser, or of the execution of the deed by him, an entry in the books of the company of a transfer to a purchaser on the 28th of March, was held not to be evidence that the plaintiff had then ceased to be a partner; or if it was *prima facie* evidence of that fact, it was rebutted by the letters of the plaintiff of a subsequent date, admitting himself to be a partner.

THE first and second counts of the declaration were upon a bill of exchange, dated 8th of April 1826, for 61*l.* 2*s.* 9*d.*, purporting to have been drawn by the Cornwall and Devonshire Mining Company, by their agent *R. Wilks*, payable to the order of the plaintiffs, and accepted by the defendant. The third count was upon a bill of exchange of the same date and amount, alleged to have been drawn by the defendant upon the Cornwall and Devonshire Mining Company, payable to the plaintiffs. There were counts for goods sold and delivered, work and labour, money lent and advanced, &c. Pleas, first, general issue; and, secondly, that the promises, if any, were made by the defendant together with *Reynolds* one of the plaintiffs jointly, and not by the defendant separately and without *Reynolds*. Upon this plea issue was taken. At the trial before Lord Tenterden C. J., at the London sittings after Hilary term 1828, it appeared that the action was brought by the plaintiffs to recover the price of goods sold by them to the Cornwall and Devonshire Mining Company, between the 16th of November 1825 and the 28th of May

1826, against the defendant, who was a member and director of that company. In part payment of this account, *Wilks*, mine cashier to the company, drew upon the company the following instrument:—“*Redruth*, April 8th 1826. Two months after date pay to the order of Messrs. *Harvey, Williams, and Co.* sixty-six pounds two shillings and nine-pence, value received. For the *Cornwall and Devonshire Mining Company, Rowland Wilks*, Mine Cashier. To the *Cornwall and Devonshire Mining Company, Lombard Street, London.*” The bill was accepted for the company by their secretary. The deed by which the company was established was produced by the plaintiffs, and the execution of it by the defendant in person proved. The execution of it by *Reynolds* purported to have been by *Wilks* acting under a power of attorney for him, but that power of attorney was not produced. The defendant, in order to shew that *Reynolds* had been a shareholder, produced and read in evidence several letters written and addressed by him to the secretary to the company. In one, dated 5th *November* 1825, he resigned his office of director, and alleged as a reason for so doing that his engagements were so numerous that he could not continue to hold the office. In another, of the 11th of *February* 1826, he informed the secretary that he had disposed of his thirty shares to Mr. *John Jeffery*, and desired to have the transfer made. In a letter of the 20th of *February* 1826, *Reynolds* informed the secretary that the consideration to be paid by Mr. *John Jeffery* for the thirty shares was 360*l.*, and requested that the necessary transfer for the execution of the contracting parties might be sent without loss of time. In another letter, of the 30th of *March*, he expressed his surprise at not

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having received the transfer for his shares, and requested to have it without further delay. The following clauses of the deed of settlement were read:—
“ Any proprietor of the said company or partnership society who shall be desirous of selling any shares held by him in the said company, shall give notice thereof in writing at the office of the company, specifying and truly setting forth in such notice the share or number of shares so intended to be sold, and the price for which he hath agreed to sell the same; and the name and place of residence of the person who shall have agreed to become the purchaser.

No person who shall hereafter purchase shares in the company shall become or be deemed a proprietor of the said company in respect of the shares so purchased by him, unless and until he shall duly execute at the office of the company, either in person or by attorney, these presents, or such further or other deed as may be from time to time, by order of the directors for that purpose, prepared. And he shall immediately after such execution by him, and not before, become a proprietor of the said company.

“ The board of directors shall, on notice being received at the office of the company, of the transfer of any shares in the company (provided such transfer be made in all respects in conformity with the rules and regulations of the company in that behalf, whether herein contained or otherwise), cause such transfer to be registered in the books of the company, or in such manner as the existing rules and regulations of the company may in that behalf direct.

“ Every person by whom any shares shall be transferred conformably to the provisions hereinbefore contained, and the other existing rules and regulations (if any)

any) for the time being of the company in that behalf, and who shall have paid all instalments that may then have become payable on the shares so transferred, shall, immediately after such transfer shall have been registered in the books of the company, cease to be a proprietor of the company in respect of such shares; and the person so ceasing to be a proprietor shall, as between him and the other proprietors and shareholders of the company, and also as to all other persons whomsoever (as far as the rules of law and equity will permit), be thenceforth and for ever thereafter exonerated from all claims to which such person was subject in respect only of such shares, and shall be indemnified therefrom out of the funds and property of the company, or otherwise by the remaining and other proprietors of the company."

The clerk to the company proved, that he, after the receipt of *Reynolds's* letter of the 30th of *March* 1826, had prepared and sent to *Reynolds* for execution a transfer of his shares to *Jeffery*, but that it was never returned by him; nor had *Jeffery*, the intended transferee, ever executed the deed of settlement as a purchaser. The plaintiffs produced the register-book of the company, in which there was an entry of the date of the 28th of *March* 1826, of a transfer of the shares by *Reynolds* to *Jeffery*. Upon this evidence it was contended on the part of the defendant, that *Reynolds*, having admitted himself to be a shareholder, must be taken to have recognized the deed of settlement which was executed for him by *Wilks*, and was, therefore, bound by its contents; and that as the deed required, in order to make a good transfer (so that the liability of a former shareholder should cease), that certain things should be done, viz. that after notice received by the company of a transfer duly made according

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to the rules, the transfer should be registered, and that the purchaser should execute the deed of settlement; and as *Jeffery* had not executed the deed of settlement, nor *Reynolds* executed the transfer, it followed that the latter never had ceased to be a partner. Secondly, that the instrument declared upon in the first three counts was not a bill of exchange within the custom of merchants, because a bill of exchange within that custom was a letter addressed by one person to *another*, requesting that other to pay a sum of money to the drawer or a third party: whereas by the instrument in question a man wrote a letter to himself, and called upon himself to pay. Thirdly, that this instrument was void by the bank act, 21 G. 3. c. 60. s. 12., because it was drawn and accepted by more than six persons. It could not even be treated as a promissory note, so as to be evidence under the money counts, because, being drawn by a person who was an agent (not a merchant or trader), it was not a promissory note authorized by the statute 3 & 4 Ann. c. 9. Lord *Tenterden* C. J. was of opinion that there was evidence to shew that *Reynolds* had been a partner, and that he had ceased to be so on the 28th of *March* 1826; and directed the jury to find for the plaintiffs for the amount of the bill and interest, as well as for the goods sold by the plaintiff after the 28th of *March* 1826, and reserved liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained for entering a nonsuit, or for reducing the verdict to the amount of the goods sold after the 28th of *March* 1826,

Sir *J. Scarlett* and *Chitty* now shewed cause. There was no proof that *Reynolds* executed the deed of settlement or partnership; for *Wilks* could not execute a deed

deed so as to bind *Reynolds* without a power of attorney, and no such power of attorney was proved : *Reynolds* was not therefore proved to have been a party to the deed. Assuming, however, that *Reynolds's* letters were evidence to shew that he once was a shareholder or partner, there was also evidence to shew that he had ceased, on the 28th of *March*, to be a partner; and if that be so, the plaintiffs are entitled to recover for the goods delivered by them after that day, as he was not a partner at the time when the bill was drawn. *Reynolds* was proved to be a partner, by his acknowledgment that he was a holder of shares. An acknowledgment by the defendant that *Reynolds* had ceased to be a partner, will be evidence of that fact against him. The entry in the books of the company of the transfer of the shares by *Reynolds* on the 28th of *March*, is an admission of that fact by the defendant. As against him, it is a proof that *Reynolds* had then ceased to be a partner. As to the bill being void by the provisions of the bank act, that act only prevents more than six persons from raising money by the issuing of bills or notes; but it does not prevent a company of more than six persons from paying their debts by their own bills or notes. In *Wigan v. Fowler (a)*, Lord *Ellenborough* was of opinion that the protection meant to be given by the bank act was against companies of bankers, and that it was not the intention of the legislature to prevent copartners, who were not bankers, from drawing bills for the purposes of commerce; and in that case the Court afterwards refused a rule for a new trial. Then as to the objection, that a party cannot be both drawer and acceptor of a bill, that is not universally true. In *Josceline v. Lassere (b)*, *Eyre* Justice says, "It is not

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(a) 1 *Stark. N. P. C.* 459.(b) *Forbes v. Rep.* 281.

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necessary to have three persons to make a good bill of exchange, for a man may draw a bill upon himself." In *Ex parte Parr* (a), Lord Eldon said, that it had been established for above thirty years that the same persons may be both drawers and acceptors, as constituting different firms. *Dehors v. Harrott* (b), and *Robinson v. Bland* (c), are authorities to the same effect. In *Stark v. Cheesman* (d) a bill of exchange was drawn by the defendant upon himself; and after verdict for the plaintiff many objections to the declaration were taken in arrest of judgment, but it was not objected that the bill was void because it was drawn by the defendant upon himself.

Campbell and Platt contra. If *Reynolds* was a partner at the time when the bill was drawn or the goods were sold, it is clear that he cannot recover either upon the bill or for the goods sold. The bill was drawn upon the company by their agent, and made payable to *Reynolds*. If he recovers in the action from the defendant, it will be a recovery by one joint contractor against another, and then the defendant will be entitled to call upon *Reynolds* for contribution. *Teague v. Hubbard* (e) shews, that under such circumstances *Reynolds* cannot recover, either upon the bill or for the goods sold after the 28th of *March*, provided *Reynolds* was a partner at the time when the bill was drawn and when the goods were sold. His own letter proves that he was a partner after the 28th of *March* 1826, for on the 30th he desires the transfer of his shares to be made. He thereby admits that he was at that time the holder of shares: that was proof that he was then a partner. There was

(a) 18 Ves. 69.

(b) 1 Show. 159.

(c) 2 Burr. 1077.

(d) Carth. 509.

(e) 8 B. & C. 545.

no evidence that he afterwards ceased to be a partner; for he must continue a partner so long as the partnership was not put an end to by the means required by law. Now the deed of settlement provides, that a person who has once become a partner shall only cease to be so by doing certain things therein mentioned; among others, by causing the transfer to be registered, after giving notice to the company of a transfer made according to the rules. It was not proved that any assignment or transfer was ever executed by *Reynolds*. The register of the transfer on the 28th of *March* might, perhaps, be *prima facie* evidence against any member of the company, that all the other things required by the deed to be done before a transfer is made had been done; and that *Reynolds*, therefore, had ceased to be a partner on that day, according to the rule, “*omnia præsumentur rite esse acta*.” But that presumption is rebutted in this case by *Reynolds’s* letter of the 30th of *March*. Besides, the bill being accepted by more than six persons, is, at all events, void by the several acts made for the protection of the bank of *England*. *Broughton v. The Manchester Water Works* (a) shews that those acts apply to all companies, for whatever purposes established. [Bayley J. In *Magor v. Hammond* (b), all the Judges were of opinion that those acts did not prevent more than six persons from paying their debts by their acceptance, but merely prevented more than six persons carrying on a banking concern.] The instrument declared upon is not a bill of exchange within the custom of merchants, because the drawer and drawee are the same

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(a) 3 B. & A. 1.

(b) This was a special verdict in C. B. argued before the twelve Judges. It is not reported.

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person. The cases relied upon do not apply. In *Starke v. Cheesman* (a), it did not appear on the face of the declaration that the drawer and drawee were the same person. That could not, therefore, have been raised as an objection on a motion in arrest of judgment. In *Dehors v. Harriot* (b), it does not appear from the report how the declaration was framed, or what evidence was given. In *Robinson v. Bland* (c), the defendant at *Paris* drew a bill on himself in *London*; it was unnecessary to make any objection to the form of the bill, because it was clearly void, the consideration having been proved to have been money won and lost at play. It has never been determined, after argument, that such an instrument was a bill of exchange within the custom of merchants. [Bayley J. In *Magor v. Hammond* (d), all the Judges were of opinion that an instrument might be a bill of exchange, though the drawer and drawee were the same person.]

Lord TENTERDEN C. J. I think that, although the execution of the partnership deed by *Reynolds* was not proved, yet his own letters shew that he had become a partner according to the terms of the deed. Then the only question is, Had he done enough to relieve himself from his liability as a partner? No actual transfer of his shares was proved; no execution of the deed by *Jeffery*, to whom the transfer was intended to have been made; and no acts of *Jeffery* by which it would appear that he had made himself chargeable as a partner. There was evidence, therefore, to shew that *Reynolds* was a partner, but none that he had ceased to be so.

(a) *Carth.* 509.(c) 2 *Burr.* 1077.(b) 1 *Show.* 159.

(d) C. P.

BAYLEY J. concurred.

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PARKE J. There was evidence to shew that *Reynolds* was a proprietor. I think, also, there was *prima facie* evidence to shew that his shares had been transferred on the 28th of *March*, and that he had then ceased to be a partner; but that *prima facie* evidence was rebutted by his own letter of the 30th of *March*. The rule for entering a nonsuit must be made absolute.

Rule absolute.

SWEETING against HALSE.

Jelliffe v. Mundy & Co.

DECLARATION by plaintiff as drawer against the defendant as acceptor of a bill of exchange for 157*l.*, dated the 25th *March* 1826, payable two months after date. Plea, general issue. At the trial before Lord *Tenterden* C. J., at the *Middlesex* sittings after *Easter* term 1828, the following appeared to be the facts of the case: — The plaintiff (who was an illiterate man), being possessed of 4 per cent. stock, was induced by the defendant to sell 157*l.* 4 per cents., which produced 150*l.*, and to lend that sum to him; and as a security for the payment, the bill for 157*l.* (mentioned in the declaration), and which purported to be accepted by the defendant and one *Amman*, was given by the defendant to the plaintiff. There was no such person as *Amman*. When the bill became due, the plaintiff, at the request

When a bill of exchange became due, it was agreed between the drawer and acceptor, that it should be renewed; and on the back of the bill another instrument for the same value was drawn, and accepted by the same parties, but it was not stamped. At the same time, the name of the acceptor was erased from the first bill. In an action on that bill, the Judge left it to the jury to find whether it had

been cancelled with the consent of the drawer, and the unstamped instrument was submitted to the view of the jury; they having found that the bill was cancelled with the consent of the drawer, this Court made a rule for a new trial absolute, on the ground that the jury ought not to have been permitted to draw a conclusion of fact from the unstamped instrument.

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of the defendant, consented to renew it for six months, and on the back of the bill the defendant's son drew an instrument in the following terms:—"Six months after date pay to me or my order the sum of 157l. stocks, new 4 per cents., value received." The plaintiff signed this bill as drawer, and the defendant as acceptor, but it was not stamped, and the defendant's son then drew a line through the names of the defendant and *Annan* in the original bill. It was objected for the defendant, that the acceptance of the bill of exchange having been cancelled, it had ceased to be an available instrument, and that the plaintiff could not sue upon it, but was bound to resort to the second instrument, *Reed v. Deere* (a). On the other hand it was contended, first, that the instrument had not been cancelled with the assent of the plaintiff (he being an illiterate person, and the defendant's son having cancelled the acceptance); and assuming that it had, still if the cancellation took place in consideration of his having the substituted security, if that turned out to be unavailable for want of a stamp, the original bill would continue in force, and *Roe dem. Berkeley v. Archbishop of York* (b) was cited. The question was, with what intention the instrument was cancelled. Lord *Tenterden* C. J. said, Assuming the acceptance to have been cancelled with the assent of the plaintiff, then it was a mere question of law, whether, when the substituted contract was entered into, the plaintiff could sue on the bill, or was bound to resort to the second contract; and he directed the jury to find for the defendant if they thought the acceptance was cancelled with the assent of the plaintiff; and in order to form their judg-

(a) 7 B. & C. 261.

(b) 6 East, 86.

ment,

ment, they were allowed to take into consideration the unstamped instrument indorsed on the bill. They having found for the defendant, leave was given to the plaintiff to move to enter a verdict for the amount of the bill. A rule nisi had been obtained in *Trinity* term, either for entering the verdict for the plaintiff for the amount of the bill, on the ground that, even assuming the acceptance to have been cancelled with the consent of the plaintiff, and the new contract substituted for it, still, as that substituted contract was not available, the old one continued in force; or, secondly, for a new trial, on the ground that the conclusion drawn by the jury was wrong.

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Campbell and *Barstow* now shewed cause. The acceptance of the first bill having been cancelled with the consent of the drawer, he cannot now sue upon it. The second instrument may have a proper stamp affixed to it, and the plaintiff may then sue upon it. In *Reed v. Deere* there were two agreements to refer to arbitration, but the terms of the second varied from those of the first. The first only was stamped; and it was held that although the second could not be read in evidence to support the plaintiff's case, it might be looked at in order to ascertain whether the first was altered by it; and that, therefore, the plaintiff could not exclude the second agreement, and proceed upon the counts setting out the first only. That case is directly in point.

Sir *J. Scarlett* and *Chitty* contra. The second instrument is not available as a bill of exchange, not merely because it is not stamped, but also because it is drawn for stock; it can operate only as an agreement. But that
agreement

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agreement not having been stamped, ought not to have been submitted to the jury. Though the jury have found that the bill was cancelled with the consent of the drawer, the question is, with what intention that was done. The drawer never could have intended to give up his right to the sum secured by the bill, for he took another instrument which turned out to be unavailable. Now, if the only consideration for putting an end to an available instrument, be the giving of another security which turns out to be unavailable, the original security will continue in force, *Roe dem. Berkeley v. Archbishop of York*. A bill of exchange drawn on a wrong stamp has been held not to be a payment, although the acceptor would have paid it if presented in due time, *Wilson v. Vysar (a)*. But if the second instrument had been stamped, it would have been no answer to this action, because though a promise before it is broken may be discharged by a parol agreement, it cannot afterwards without accord and satisfaction. This instrument operates as accord without satisfaction.

Lord TENTERDEN C.J. In *Reed v. Deere* the Court looked at the second instrument, to see whether it had the effect of varying the first. In this case the jury looked at the second instrument, and were allowed to know its contents; and it was then left to them, knowing that the plaintiff had signed the second instrument, which was a security for the same sum for which the first had been given, to say, whether the former instrument had been cancelled with the assent of the plaintiff. The jury, therefore, were allowed to draw a conclusion

(a) 4 Taunt. 288.

of fact from an unstamped instrument, which, in point of law, could not be done. The rule for a new trial must therefore be made absolute.

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against
HALK.

BAYLEY J. concurred.

PARKE J. It seems to me that the plaintiff cannot recover on the bill of exchange declared on, because the cancellation of that bill, with the consent of the plaintiff, was a waiver by him of the defendant's acceptance. There was evidence of his assent, independently of the fact of his having executed the second instrument. But still, as the substituted instrument (which was unstamped) was laid before the jury, and as they may, to a certain degree, have been induced by a knowledge of its contents to find that the former instrument was cancelled with the consent of the plaintiff, I think the rule for a new trial ought to be made absolute, though I am not satisfied that the verdict ought not to be the same.

Rule absolute for a new trial (a).

LITTLEDALE J. was absent.

(a) The plaintiff afterwards obtained a rule for leave to amend his declaration and issue, by adding counts on the second instrument; but that rule was discharged. He then obtained a rule to discontinue the action; and, upon taxation, the master allowed the defendant the costs of the trial. A rule nisi was obtained for the master to review his taxation, on the ground that, as the rule for the new trial was silent as to costs, the defendant was not entitled to the costs of the trial; and *Gray v. Cox* (5 B. & C. 458.) was cited.

The plaintiff having discontinued the action, it was held, that the defendant was entitled to the costs of the trial.

In Goodenough v. A.
2 C. & D. 240

Bartow, in *Trinity* term 1829, shewed cause. In *Gray v. Cox*, the verdict at the trial was in favor of the plaintiff. There is a distinction between those cases where there is and is not a second trial. In the latter

cases,

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against
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case, the costs of the first trial are to be paid by the party who does not succeed. The plaintiff in this case, by discontinuing the action, has admitted that the verdict was right upon the merits. *Jackson v. Hallam* (3 B. & A. 317.) is in point.

Chitty, contra. In that case, the defendant, by giving a cognovit, admitted that the plaintiff was entitled to succeed upon the merits; but here the plaintiff, by discontinuing, has only admitted that the defendant was entitled to succeed upon the record. If the plaintiff, before the trial, had got the instrument stamped, he would, upon the record as it stood, have obtained a verdict which could not have been set aside. The rule for the new trial, after a verdict for the defendant, was made absolute, because that instrument, for want of a stamp, was improperly submitted to the jury.

Lord TENNYSON C. J. The terms upon which a party should be allowed to discontinue are in the discretion of the Court. Here the ground upon which the new trial was granted was, that the second instrument was not stamped, and ought not, therefore, to have been laid before the jury. From the very nature of the objection, I think that the plaintiff ought not to be allowed to discontinue, and bring a fresh action, without paying the costs of the trial. *Jackson v. Hallam* is an authority in point; for here the plaintiff, by discontinuing the action, has admitted that the verdict was right.

Rule discharged.

SAMS *against* CULHAM and Another.

Notice of declaration must state the nature of the action.

BRODRICK had obtained a rule nisi to set aside the proceedings for irregularity, on the ground that the notice of declaration did not state the nature of the action. No appearance had been entered, or common bail filed for the defendants.

Archbold now shewed cause, and contended that the notice was regular, and that the rule of Court of *Trinity* term 1 G. 2. 1727, which required a statement of the nature

nature of the action, applied only to cases where the plaintiff proceeds by entering an appearance or filing common bail for the defendant under the 12 G. 1. c. 29. But,

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against
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Per Curiam. There is no reason for any such distinction; in either case you must express the nature of the action. The notice does not inform the defendant what it is.

Rule absolute.

MEMORANDUM.

In the course of this term *Edward Goulburn*, Esquire, was called to the degree of the coif, and gave rings with the motto "Nulla retrorsum."

END OF HILARY TERM.

C A S E S

1829.

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Tenth Year of the Reign of GEORGE IV.

Thursday,
January 7.

WINKS and Another, Assignees of WHITE, a
Bankrupt, *against* HASSALL and Another.

A. having two pipes of wine lying in a bonded warehouse in the name of *B.*, who had given bond for the duties, sold them to *C.*, and gave him a delivery order; and it was at

the same time agreed that *C.* should pay the duties. When they became payable, *B.* was called upon and paid them, and took away the wine to his own cellar. *A.* repaid the amount of duties to *B.*; *C.* never required *B.* to transfer the wine to his name, but he afterwards took away one pipe, and was charged with and paid warehouse rent to *B.*; *C.* afterwards became bankrupt, and his assignees demanded the other pipe: Held, that *B.*, at *A.*'s request, was entitled to keep it until the duties were repaid.

who

who had given a bond. At the time of the purchase, *White* received from the traveller of *Stroud* and *Smith* the following order:—“Messrs. *Hassall* and *Foulkes* (defendants), you will please deliver Mr. *T. White*, or his order, two pipes of port wine ex. *Wakefield*, marked, &c. free of all expenses of freight and bonding, for which will thank you to value on the house in *London* ;” and it was agreed that *White* should pay the duties and get the wine out of bond. *White* never required the defendants to transfer the wine, nor was it in fact transferred to him in their books. In *November* 1827 the duties became payable, and were paid by the defendants in discharge of their bond, and the money was repaid to them by *Stroud* and *Smith*. The defendants, when they paid the duties, removed the wine to their own warehouse. In *November* 1827, *White* resold one of the pipes, and it was delivered by the defendants to his order, and they charged him with warehouse rent from the time of his purchase to the time of the delivery, which he paid; and *Stroud*, in *June* 1828, addressed to him the following letter:—“Messrs. *Hassall* and Co. having written me early in last *November*, to request me to remit the amount of duties, as the wines had run out the time allowed under the bond; I immediately, for your accommodation, remitted the amount. I have, therefore, added it to the account furnished you;” and concluded by demanding payment. In *July* 1828 *Stroud* wrote to the defendants, desiring them not to deliver the pipe of wine then remaining in their custody, without being paid the amount of the duty. *White*, having afterwards become bankrupt, a commission was issued against him, under which the plaintiffs were duly chosen assignees, and demanded of

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the defendants the pipe of wine in their custody, tendering the amount of their charges for warehouse rent, &c. The defendants refused to deliver it unless the amount of the duty was also paid. Lord *Tenterden* C. J. being of opinion that the plaintiffs had no right to the wine without paying the amount of the duty, directed a nonsuit, but gave the plaintiffs leave to move to enter a verdict in their favour.

Campbell now moved accordingly. From the time when the contract for the sale of the wine was made, and the delivery order given, the defendants held the wine as agents for *White*, and not for the vendors. That they so considered themselves, is evident from their having charged him with warehouse rent from the date of the delivery order. The transfer was, therefore, complete, and no lien on the wine could be obtained by the vendor after that time. [*Bayley* J. If *White* had immediately after the purchase demanded the wine, what must he have paid?] The duty certainly; for the defendants, having given bond, had a lien for the duty. But they afterwards paid the duty, and were reimbursed by *Stroud* and *Smith*. That, however, was a voluntary payment, as *Stroud* himself says, “for the accommodation of *White*,” and, therefore, could not confer a right of lien. [Lord *Tenterden* C. J. It appeared that the wine was never transferred to the bankrupt in the books of the defendants.] It is immaterial whether the warehouseman makes the transfer or not, provided the vendor gives a delivery order. The warehouseman may, as soon as he knows of it, consider himself as agent for the purchaser, and charge him with warehouse rent, and the defendants did so in this instance.

Lord

LORD TENTERDEN C. J. The wine at the time of the sale was lying in a bonded warehouse, and unless the duties had been paid by the vendor or the defendants, the bankrupt could never have obtained the wine without paying them. It is said that the money was paid voluntarily, for the accommodation of the bankrupt. But the defendants were bound to pay it, and I think the repayment by *Stroud* to them, cannot be considered as a voluntary payment. That being so, and the payment being for the benefit of the bankrupt, and without which he never could have obtained the wine, I think that, in law and justice, the assignees were precluded from demanding the wine before they had repaid the money.

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BAYLEY J. By the original contract, *White* was bound to pay the duty, and the delivery order did not entitle him to the possession of the wine until he had paid it. He never did pay, and the obligees of the crown were obliged to do so; and then called upon the vendors to repay, which they did. Without putting the case on the ground of lien, it seems clear that the assignees cannot claim the wine, neither they nor the bankrupt having paid that which he originally engaged to pay.

LITLEDALE J. The delivery order did not entitle *White* to get possession of the wine without paying the duty, and the charge of warehouse rent does not, I think, constitute such a delivery as to give the plaintiffs a right to maintain the action.

PARKE J. It is clear that by the contract the bankrupt was to pay a certain price for the wine, and the

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duty also. The duty was in substance an additional part of the price, to be paid before the vendee could have possession. *Stroud*, therefore, is in the situation of an unpaid vendor. It is said, nevertheless, that he waived his right of lien by giving the delivery order, but I am clearly of opinion that it had no such effect; it was never acted on, and *White* proving insolvent, the vendor had a right to resort to the possession of the goods to secure himself. If *White* had required a transfer of the goods, and that had been actually made, it would have furnished a strong argument for the plaintiffs; but that was never done, and the case of *Bloxam v. Sanders (a)*, shews that the mere demand of warehouse rent did not make the possession of the warehouseman the possession of the bankrupt. The nonsuit was therefore right.

Rule refused.

(a) 4 B. & C. 941.

Thursday,
May 7th.

DOE dem. AMBLER *against* WOODBRIDGE.

In ejectment for a forfeiture incurred by using rooms in a house in a manner prohibited by the lease: Held, that such user was a continuing breach, and that the landlord was not, by receiving rent, precluded from taking advantage of the forfeiture, provided the user continued after such receipt of rent.

EJECTMENT for a house in the city of *London*.

Plea, not guilty. At the trial before Lord Tenterden C. J. at the *London* sittings after *Hilary* term, it appeared that the lessor of the plaintiff was owner of the house in question, which the defendant occupied under a lease, containing a covenant that the tenant should not alter, convert, or use the rooms thereof then used as bed-rooms, or either of them, into or for any

other

other use or purpose than bed or sitting rooms, for the occupation of himself, his executors, &c., or his or their family, without the licence of the lessor in writing; and the lease contained a clause of forfeiture for breach of any covenant. The defendant had let part of the house to a lodger, who occupied up to the time of the trial the rooms specified in the covenant above set out; but the lessor had, after he knew of such occupation, received rent under the lease: and the only question was, Whether by so doing he had waived the forfeiture? Lord *Tenterden* C. J. thought there was a continuing breach as long as the rooms were occupied contrary to the covenant, and directed the jury to find for the plaintiff, but gave the defendant leave to move to enter a nonsuit.

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Denman now moved accordingly, and contended, that the receipt of rent by the landlord was a waiver of the forfeiture. In *Doe v. Allen* (a) ejectment was brought for a forfeiture incurred by carrying on a trade prohibited by the lease. The defendant could not prove any payment of rent after the business was commenced, but it appears to have been admitted by the Court that such proof would have been an answer to the action. In *Doe v. Banks* (b) the payment of rent was held not to be a waiver, because the breach of covenant, which consisted in ceasing to work a coal-mine for a certain period, was not complete at the time of the payment.

Per Curiam. The conversion of a house into a shop, is a breach complete at once, and the forfeiture thereby incurred is waived by a subsequent acceptance of rent.

(a) 3 Taunt. 78.

(b) 4 B. & A. 401.

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Dor dem.
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But this covenant is, that the rooms shall not be used for certain purposes. There was, therefore, a new breach of covenant every day during the time that they were so used, of which the landlord might take advantage; and the verdict which proceeded on the particular words of this covenant was right.

Rule refused.

Friday,
May 8th.

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A., who was resident in France, being indebted to *B.* for money lent, promised by a written instrument to pay *B.* the sum therein mentioned within one month after his (*A.*'s) arrival in England. *A.* arrived in England in 1814. In 1818 *B.* applied to the attorney of *A.* for payment, and in 1819 commenced an action, which was continued till Easter term, 1828, when the cause was tried: Held, that *B.* was not entitled to recover interest on the principal sum, either from the time of *A.*'s arrival in England, or from the time when *B.* endeavoured to obtain payment, interest not being due on money secured by a written instrument, unless it appears on the face of the instrument itself that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments.

THIS was an action brought to recover the sum of 135*l.* due upon the following instrument. "*Guerët*, April 18th, 1814. In one month after my arrival in England, I promise to pay Captain *W. E. Page*, or order, the sum of 135*l.* as sterling, for value received. *C. Newman*." The instrument was described in the first count of the declaration as an agreement; in the second count as a promissory note. Pleas, first, general issue; and, secondly, the statute of limitations. Replication to the last plea, that the plaintiff, in 1819, had commenced this suit by latitat, and continued it by a bill of *Middlesex*, to which there was a demurrer and judgment for the plaintiff (*a*). At the trial before Lord *Tenterden* C. J., at the *Middlesex* sittings after last term, the following appeared to be the facts of the case. The plaintiff and defendant, in 1814, were prisoners of war at *Verdun*, in *France*. The plaintiff lent the defendant various sums

(a) See 8 *B.* & *C.* 489.

of money ; and the latter, as a security for the payment of the same, signed the instrument declared on. In *June* 1814, the defendant came to *England*. During the year 1818 the plaintiff applied to the defendant's attorney, in order to procure payment of the sum due on the note, and in 1819 commenced this action against the defendant. It was contended, on the part of the plaintiff, that he was entitled to recover interest upon the principal sum secured by the written instrument, either from the expiration of six months after the defendant arrived in *England*, or at least from the time when he had endeavoured to obtain payment of the sum due to him. Lord *Tenterden* C. J. was of opinion, there being no express agreement to pay interest, that the plaintiff was not entitled to recover it by law, and a verdict was found for the plaintiff for 135*l.* only.

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Denman now moved for a new trial. The plaintiff was entitled to recover interest by way of damages for the detention of his debt, either from 1814, when the defendant arrived in *England*, or at least from 1818, when the plaintiff endeavoured to obtain payment. In *Blaney v. Henricks* (a), it was held that interest is due on all liquidated sums from the time when the principal becomes due and payable. In *Arnott v. Redfern* (b), the question seems to have been very fully considered ; and there *Best* C. J. in one part of his judgment is reported to have said, " However a debt is contracted, if it has been wrongfully withheld by a defendant after the plaintiff has endeavoured to obtain payment of it, the jury may give interest in the shape of damages for the unjust

(a) 2 *Wils.* 205.(b) 3 *Bing.* 555.

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detention of the money;" and in a subsequent part of the same judgment, he pronounces it as the decision of the whole Court, "that although it (interest) be not *due ex contractu*, a party may be entitled to damages to the amount of interest for any unreasonable delay in the payment of what is due under the contract." Here there has been unreasonable delay, for the money payable by virtue of the contract became payable in 1814.

Lord TENTERDEN C. J. It is a rule sanctioned by the practice of more than half a century, that money lent does not carry interest. In *Calton v. Bragg* (a) Lord *Ellenborough*, speaking at that time of a period of more than fifty years, said, "During this long course of time no case has occurred where, upon a mere simple contract of lending, without an agreement for payment of the principal at a certain time, or for interest to run immediately, or under special circumstances, from whence a contract for interest was to be inferred, has interest ever been given." In *Higgins v. Sargent* (b), which was an action of covenant upon a policy of insurance upon the life of one *R. C. Burton*, payable six months after due proof of his death, it was held that the assured were not entitled to recover interest upon the sum insured from the expiration of six months after the death of *Burton*. There (as in this case) the sum became due upon a contingency, and it was held that interest was not due from the time when the principal sum became payable. If we were to adopt as a general rule that which some of the expressions attributed to the Lord Chief Justice of the Common Pleas in *Arnott v. Red-*

(a) 15 East, 223.

(b) 2 B. & C. 348.

fern would seem to warrant, viz. that interest is due wherever the debt has been wrongfully withheld after the plaintiff has endeavoured to obtain payment of it, it might frequently be made a question at nisi prius whether proper means had been used to obtain payment of the debt, and such as the party ought to have used. That would be productive of great inconvenience. I think that we ought not to depart from the long-established rule, that interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments. Here the language of the instrument is such as to lead to the conclusion that the parties did not intend that interest should be payable. The sum secured by the instrument was 135*l.* only, payable at a time depending on a contingency, and no provision was made for the payment of interest up to that time. If there had been such a provision, it would have afforded a strong ground for contending that it was intended interest should also be paid from the time when the principal became due to the time of actual payment; but the omission of any such term in the instrument leads to the conclusion, that the sum of 135*l.* was the only sum intended to be secured. In proceedings in error in the Exchequer Chamber, interest is allowed in those cases only where interest would have been recoverable in the court below.

Rule refused.

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Friday,
May 8th.

MAYNE *against* FLETCHER.

In an action for a libel contained in a newspaper, Held, that the publication was proved by the production of a newspaper corresponding in title, &c. with that described in the affidavit lodged at the stamp-office.

THIS was an action for a libel published by the defendant in a newspaper called the *Chester Chronicle*. Plea, not guilty. At the trial before the Chief Justice of *Chester*, at the Spring assizes 1829, the plaintiff produced a certified copy of the affidavit lodged at the stamp-office in pursuance of 38 G. 3. c. 78. s. 1., in which the defendant was described as the printer and publisher, of the above newspaper, and then produced a newspaper containing the libel, and corresponding in the title, and in the names and descriptions of printer and publisher, with the newspaper mentioned in the affidavit. It was contended, that this was no evidence of publication; that the plaintiff ought either to have produced the copy of the newspaper delivered to the commissioners of stamps, or to have proved that the copy produced was published by the defendant. The learned Judge overruled the objection, and a verdict was found for the plaintiff.

Jones Serjt. moved for a new trial. There was no evidence of any publication of the libel by the defendant. The affidavit lodged at the stamp-office only proved that the defendant was proprietor, printer, or publisher of a newspaper called the *Chester Chronicle*. The plaintiff ought to have proved that the defendant published the libel in question, by shewing that the newspaper produced was purchased of the defendant, or by producing the copy of the newspaper lodged at the

the stamp-office pursuant to the seventeenth section of the 38 G. 3. c. 78. It is consistent with all the facts proved, that the paper containing the libel may have been taken away from the printing-office, or even delivered by mistake, (which would be no publication), *Rex v. Paine (a)*; or that it might not have existed an hour before it was produced in evidence. The statute 38 G. 3. c. 78. was passed (as appears by the title) to prevent the publication of newspapers by persons not known. The object was to secure to the public a known and responsible publisher. It was not intended to dispense with the proof of publication which was required before the statute, but to relieve the plaintiff from proving, as before its passing it was necessary to do, that the defendant was proprietor or printer of the paper, and also that *he* published the particular one containing the libel in question. In *Rex v. Topham (b)*, proof was given that the newspaper was purchased of the defendants. The eleventh section of the statute says, that the plaintiff need not prove that the newspaper to which the trial relates was purchased at any house, shop, or office belonging to or occupied by the defendant or his servant, or where he carries on his business of printing or publishing the paper, or where the same is usually sold. It dispenses with the necessity of that mode of proof of publication. But by section 17. it substitutes another mode of proof; for by that section every printer or publisher of a paper is required to deliver to the commissioners of stamps one of the papers so published, signed by the printer or publisher in his hand-writing, with his name and

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(a) 5 Mod. 167., and see *Barrow v. Lewellin*, Hob. 62.

(b) 4 T. R. 126. 1791.

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place of abode; and the same is to be kept by the commissioners in their office; and upon application by any person, in order that the same may be produced in evidence, the commissioners are to cause the same to be produced in Court. Now, since the statute, the practice in all proceedings against the proprietors of newspapers, has been to produce the newspaper signed by the defendant and lodged at the stamp-office. This was done in *Rex v. Hart and Another* (a). In *Rex v. Amphill* (b) the delivery to the officer of the stamps was held to be sufficient evidence of a publication, because he would have an opportunity of reading the libel himself.

Lord TENTERDEN C. J. The eleventh and seventeenth sections are perfectly distinct from each other. The seventeenth section furnishes means of producing a newspaper which the party may not otherwise have the means of procuring, but it does not make the copy of a newspaper which may be so produced the only evidence of it. The eleventh section provides that it shall not be necessary after any such affidavit, &c. shall have been produced in evidence against the person who signed and made such affidavit or is therein named; and after a newspaper shall have been produced in evidence, corresponding in the particulars therein mentioned, with that mentioned in such affidavit, for the plaintiff or prosecutor to prove that the newspaper was purchased at any house, shop, or office belonging to or occupied by the defendant, or where he usually carries on his place of business. A purchase of a newspaper

(a) 10 East, 94.

(b) 1 B. & C. 35.

at the house, shop, or office of the defendant, would in ordinary cases be evidence of publication. Here the plaintiff or prosecutor is, by the express terms of the statute, exempted from bringing such evidence after having produced the affidavit lodged at the stamp-office, and a newspaper corresponding in certain respects with that mentioned in the affidavit. The evidence of publication was sufficient.

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BAYLEY J. If a paper corresponding with the paper described in the affidavit is produced, the party producing it is to be in the same situation as if he had proved that the paper had been bought at the house, shop, or place of business of the defendant. The evidence is only *prima facie*, and fraud would rebut it.

Rule refused (a).

(a) In *Res v. John and Leigh Hunt* (1811), 51 St. Tr. by Howell, 375. the prosecutor proved a certified copy of the affidavit filed at the stamp-office, sworn by both defendants, stating both to be proprietors, and John to be printer. A newspaper was then produced, corresponding in title with that in the affidavit, but only mentioning *John Hunt* at the foot. An objection was taken, that there was no proof that the paper produced was the paper of which the two defendants appeared by the affidavit to be proprietors. Stat. 38 G. 3. c. 78. ss. 9. 11. ; and *Res v. Hart and Another*, 10 East, having been cited for the prosecution, Lord Ellenborough held, that after affidavit made as required by the act, the act made the publication of a paper, with a corresponding title, evidence of the publication by the persons stated in the affidavit to be the proprietors, such evidence being only *prima facie* evidence, and liable to be rebutted.

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*Rickard v. Darn 2 ad. Hl., N. 218,**Friday,
May 8th.***OXENDALE against WETHERELL.**

Where, by a contract of sale, the vendor agreed to deliver 250 bushels of wheat within a specific time, and delivered part, but not the residue: Held, that he might, after the time mentioned in the contract had expired, recover from the purchaser the value of the wheat delivered to and retained by him.

ASSUMPSIT for wheat and other corn, goods, wares, and merchandizes sold and delivered. Plea, general issue. At the trial before *Bayley J.*, at the Spring assizes for the county of *York* 1829, the following appeared to be the facts of the case. The action was brought to recover the price of 130 bushels of wheat, sold and delivered by the plaintiff to the defendant, at 8s. per bushel. Evidence was given on the part of the plaintiff, that on the 17th of *September* 1828, he had sold to the defendant all the old wheat which he had to spare at 8s. per bushel; and that he had delivered to the defendant 130 bushels. The defendant gave evidence to shew that he had made an absolute contract for 250 bushels, to be delivered within six weeks, that the price of corn at the time of the contract was 8s. per bushel, and afterwards rose to 10s.; and it was insisted on his part, that the contract being entire, the plaintiff not having delivered more than 130, had not performed his part of the contract, and therefore could not recover for that quantity. On the other hand, it was contended that the vendor having delivered, and the vendee having retained part, the contract was severed pro tanto, and that the plaintiff was entitled to recover the value. The learned Judge was of opinion, that even if the contract was entire, as the defendant had not returned the 130 bushels, and the time for completing the contract had expired before the action was brought, the plaintiff was entitled to recover the value of the 130 bushels which

which had been delivered to and accepted by the defendant; but he desired the jury to say, whether the contract was entire for 250 bushels, and they found that it was. Whereupon a verdict was entered for the plaintiff, and the defendant had liberty to move to enter a nonsuit if the Court should be of opinion that the plaintiff was not entitled to recover, on the ground that he had not performed the contract.

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Brougham now moved accordingly, and relied upon *Walker v. Dixon (a)*, where the plaintiff having contracted for the sale of 100 sacks of flour, at 94s. 6d. per sack, delivered part, but refused to deliver the residue, the defendant being willing to receive and pay for the whole; Lord *Ellenborough* held that the plaintiff could not recover for the part delivered, and nonsuited him.

LORD TENTERDEN C. J. In *Manning's Digest*, p. 389., the Court are stated to have set aside the nonsuit, ex relatione *Wilde*, of counsel for the defendant. If the rule contended for were to prevail, it would follow, that if there had been a contract for 250 bushels of wheat, and 249 had been delivered to and retained by the defendant, the vendor could never recover for the 249, because he had not delivered the whole.

BAYLEY J. The defendant having retained the 130 bushels after the time for completing the contract had expired, was bound by law to pay for the same.

PARKE J. Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers

(a) 2 Stark. 281.

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part, he cannot, before the expiration of that time, bring an action to recover the price of that part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered.

Rule refused.

Saturday,
May 9th.

ROTHSCHILD against CORNEY and Others.

The plaintiff was, by means of a fraud, induced to draw and pay away two cheques on his banker, amounting to 1330*l*. Six days after the date of the cheques, the defendants, acting *bonâ fide*, gave cash for them to a third person (who had not given value for them) presented the cheques, and obtained payment. In an action by the plaintiff to recover back this money: Held, that the cheques could not be treated as bills overdue, and therefore taken by the defendants at their peril, but that the real question in the cause was, Whether they had acted *bonâ fide*, and with due caution?

ASSUMPSIT for money had and received. Plea, the general issue. At the trial before Lord Tenterden C. J. at the *London* sittings after *Hilary* term, it appeared that the action was brought to recover the sum of 1330*l*. being the amount of two cheques drawn by the plaintiff on his bankers, *Masterman* and Co. which had been obtained from him, and afterwards passed to the defendants under the following circumstances:—The plaintiff was agent for paying the dividends on the *Prussian* loan contracted in 1818. The securities given by the *Prussian* government were bonds, to which a number of dividend warrants, called *conpons*, were annexed. When the dividends become due, the holder of bonds delivers the *conpons* then due, together with a list, and the name and address of the holder, to the plaintiff. The *conpons* and lists are then compared, and if found correct the *conpons* are cancelled, and a cheque drawn by *Rothschild* for the amount. The plaintiff was also agent for a *Prussian* company called the

the *Seehandling Company*, who in *January* transmitted to him coupons to the amount of 15,371*l.* to be received by him on their account. The coupons were compared with the list by one *Burn*, a clerk of the plaintiff, who then drew a cheque for the amount, which was signed by the plaintiff and sent to his banker's, who placed it to the credit of the *Seehandling Company's* account, and debited the plaintiff's private account with it. *Burn*, instead of destroying all the coupons, preserved a part amounting to 1330*l.* and procured two lists to be made out, one in names of *Sillem* and *Grantoff*, amounting to 795*l.* 5*s.*, the other in the names of *Sarans* and *Co.* amounting to 534*l.* 15*s.* *Burn* compared those lists with the coupons fraudulently preserved by him, and on the 19th of *January* drew two cheques for the amount, which were signed by the plaintiff, and the words "and Co." were written across, in order that they might be presented to *Masterman* and *Co.* through some banking-house. On the 24th of *January* one *Brady*, a wine-merchant and broker, carried these cheques to the defendants, who were wine-merchants, told them that payment could only be obtained by a banker, and that as he did not keep an account at any banker's, he wished them to give him cash for the cheques, and to get them presented by their bankers, *Remington* and *Co.* One of the defendants, who knew *Brady* personally, but was not acquainted with his residence, consented to do so, feeling sure that cheques drawn by the plaintiff would be paid. He accordingly gave *Brady* money for the cheques, and handed them to *Remington* and *Co.* who on the same day obtained payment from *Masterman* and *Co.* *Brady* received the cheques from his son, and at his request procured cash for them, with

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which the son afterwards absconded. Under these circumstances it was admitted that the defendants had acted *bonâ fide*, but it was contended that they had acted carelessly in taking the cheques; and that as they were six days old when handed to them, they must be considered as over-due, and consequently the defendants could have no better title than *Brady*, from whom they were received. Lord *Tenterden* C. J. left it to the jury to find for the plaintiff, if they thought that the circumstances of the case were such as ought to have excited the suspicions of prudent men, and that the defendants had not acted with reasonable caution, but otherwise to find for the defendants. The jury having found a verdict for the defendants,

Sir *J. Scarlett* now moved for a new trial, on the grounds that the jury ought not to have found that the defendants exercised due caution; and, secondly, that the Lord Chief Justice ought to have told them that the cheques were over-due, and that, consequently, the defendants took them at their peril, and could have no better title than *Brady*, and for this he cited *Down v. Halling (a)*.

LORD TENTERDEN C. J. Upon the whole I am of opinion that we ought not to grant a rule in this case. It cannot be laid down as matter of law, that a party taking a cheque after any fixed time from its date does so at his peril; and therefore the mere fact of the defendants having taken the cheques six days after they bore date, from a person who had not given value for

(a) 4 B. & C. 330.

them,

them, did not entitle the plaintiff to a verdict. It was indeed a circumstance to be taken into consideration by the jury in determining whether the defendants had taken the cheques under circumstances which ought to have excited the suspicions of prudent men. If the case were sent to a new trial, the same question must be presented to the jury; and as we cannot say that their former verdict was wrong, I think that we ought not to disturb it.

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BAYLEY J. I cannot say that the right question was not left to the jury, nor that their decision was wrong, although I should have been better satisfied had their verdict been the other way.

LITLEDALE J. I am of opinion that the direction given to the jury was right, and I am not prepared to say that they did wrong in finding for the defendants. It has been urged as matter of law, that a party taking a cheque over-due has it with the same title, and no other, as the person from whom he receives it. But although the rule of law certainly is so with respect to bills of exchange and promissory notes, I think it cannot be applied to cheques.

PARKE J. having been concerned in the cause when at the bar, gave no opinion.

Rule refused.

1829. - *Roberts v. Tucker* 3. E. 114, 112Monday,
May 11th.

BIRCH against The Earl of LIVERPOOL.

A contract, whereby a coachmaker agreed to let a carriage for a term of five years, in consideration of receiving an annual payment for the use of it, but which, by the custom of the trade, is determinable at any time within that period upon the payment of a year's hire, is an agreement not to be performed within a year, within the meaning of the statute of frauds, and, therefore, must be signed by the party to be charged therewith.

DECLARATION stated, that in the lifetime of Catherine, Countess of Liverpool, by agreement made on the 30th of June 1825 between the Countess and the plaintiff, it was agreed that the Countess should hire of the plaintiff, and that the plaintiff should let to hire to the Countess a carriage for a term of five years next ensuing, and that the Countess should pay to the plaintiff every year, during the term for the use of the carriage, 94*l.* 10*s.* Averment, that the carriage was delivered to the Countess, and that she received the same from the plaintiff in pursuance of the agreement; that the Countess made her will and made defendant executor, and died in October 1827; that the defendant proved the will and took upon himself the execution thereof, and by means of the premises as such executor became liable to and bound by the agreement for and during the residue of the term, and being so liable in consideration, that the plaintiff would permit the agreement to be put an end to, defendant promised to pay 94*l.* 10*s.*; that the plaintiff suffered the agreement to be put an end to, but that the defendant had not paid the money. Plea, general issue. At the trial before Lord Tenterden C. J., at the London sittings after last Hilary term, the following appeared to be the facts of the case: — The Countess of Liverpool had, in 1809, hired a carriage of the plaintiff at the rate of 85*l.* per annum, and had continued to use it until October 1815. She then hired another at the rate of 100 guineas per annum,

annum; but at the expiration of four years that contract was annulled with the consent of the plaintiff; and on the 1st of *October* 1819, she hired a new carriage of the plaintiff for six years, at 100 guineas per annum. On the 30th of *June* 1825, the Countess hired of the plaintiff a new landau for five years, at 90 guineas per annum, and in *September* 1827 died. Upon all these contracts a year's hire was paid in advance. It was proved to be the custom for coachmakers, who let carriages for a term of years, to demand and receive from the hirer a year's hire as a consideration for the annulling of any contract before the expiration of the term agreed upon. The defendant, in *October* 1827, inquired of the plaintiff what was usually done on the event of the death of a person who hired the carriage on the terms which the Countess of *Liverpool* had done. The plaintiff informed him, that the custom of the trade was to pay one year's hire as a consideration for putting an end to the contract before the term expired. The defendant said he understood that to be the custom; that he was about to leave town for a few days, and he would send the carriage home, and on his return would either write a note to the plaintiff or send to him to settle the matter. The carriage was returned on the 17th of *October* 1827. It was objected by the defendant's counsel, that there was no sufficient evidence of a promise by him to pay the year's hire upon his own account, and that even if there had been, there was no consideration for such a promise, inasmuch as there was no proof of a contract in writing signed by the Countess of *Liverpool*; the contract proved, being an agreement not to be performed within the space of one year from the making thereof, ought to have been in writing. On the other hand it was insisted, that the

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custom proved must be considered engrafted on the contract, and if so, then it was determinable at any time, and might be performed within one year. Lord *Tenterden* C. J. was of opinion, that as the contract between the plaintiff and the Countess of *Liverpool*, by the express terms of it, was an agreement not to be performed within the space of one year from the making thereof, and was not signed by the Countess, it was not binding upon her; and that, consequently, there was no consideration for the promise by the defendant to pay upon his own account. The plaintiff was nonsuited, but liberty was reserved for him to move to enter a verdict for the sum of 94*l.* 10*s.*

F. Pollock now moved accordingly. It was not necessary to prove a contract in writing, signed by the Countess, because the contract proved must, with reference to the custom of the trade, be construed to be an agreement for five years, with power to the Countess, or her personal representative, to determine it at any time during that period, by paying the amount of one year's hire. It was an agreement, therefore, which might be performed within a year from the making of it. If Lady *Liverpool* had died within the first year, her executor might have determined it. Now an agreement which may (although in fact it is not), according to its original terms and the intention of the parties, be performed within the year from the making of it is not within the statute. [*Bayley* J. In that case the defendant would be liable only in his representative character of executor, and not personally. Here the action is brought for the breach of a special contract made by him.]

Lord

LORD TENTERDEN C. J. From the very terms of the contract it appears that it was an agreement not to be performed within the space of one year from the making thereof, but that it was to continue for five years. It ought, therefore, to have been signed by the party to be charged therewith.

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BAYLEY J. Assuming that the custom proved is to be considered as part of the contract, still the contract was in its terms an agreement for five years, determinable by the parties within that period (a). It was in the very terms of it an agreement not to be performed within a year.

LITLEDALE and PARKE Js. concurred.

Rule refused.

(a) See *Res v. Herstonceaux*, 7 B. & C. 551.

ALTROFFE *against* LUNN.

Friday,
May 3th.

D. POLLOCK moved for a rule to shew cause why a writ of supersedeas should not issue to discharge the defendant out of the custody of the sheriff of *Surrey*, the plaintiff not having declared in due time. The facts were, that the defendant being in the common gaol of the county of *Surrey* on a charge of bigamy, the plaintiff, in the month of *March* 1828, obtained leave of the Court to detain the defendant upon a debt due to him. The defendant was tried about eight days after the detainer was lodged, at the Spring assizes for the county of *Surrey*, and being convicted, was sentenced to twelve months' imprisonment, and remained in the gaol

Where a detainer for debt was lodged against a person in custody on a criminal charge, who was afterwards convicted and sentenced to a year's imprisonment: Held, that the creditor was not bound to declare during that period.

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accordingly in execution of that sentence. The plaintiff did not proceed pending the imprisonment.

Per Curiam. The plaintiff was not bound to declare, and the defendant, therefore, is not entitled to relief. The defendant was not in custody of the sheriff of *Surrey* at the suit of the plaintiff pending the sentence. The plaintiff could not declare without leave of the Court, and such leave not having been given, he is not in default.

Rule refused.

*See Cumberland v. Kelly 3 B. & Ad. 602
... Maitland v. B. 119 1 C. Mod. 100*

Monday,
May 11th.

BLANDY and Another *against* HERBERT.

A. being entitled, during his life, to the dividends of certain Bank Annuities, and *B.* being entitled to the stock at the death of *A.*, it was agreed between them, that in consideration of *A.*'s permitting *B.* to sell out the stock, the latter should pay to *A.*, during his

COVENANT on an indenture dated 4th *March* 1826, made between one *A. J. Nash* of the first part, the defendant of the second part, one *Eliza Ross Lewin* of the third part, and the plaintiffs of the fourth part; whereby (after reciting that the said *E. R. Lewin* was entitled during her life to the dividends of 3384*l.* 14*s.* 3 per cent. Consolidated Bank Annuities, then lately standing in the name of *Herbert Lewis*, a trustee, in the books of the Governor and Company of the Bank of *England*; that *Amelia Ross Herbert*, the wife of the

life, an annuity equivalent to five per cent. on the principal money produced by the sale of the stock, and that, as a security for the payment of the annuity, *A.* should assign to *B.* a policy of assurance on goods on a voyage to *India*. By deed reciting these facts, and that the stock had been sold out, and produced a given sum, which had been paid to *B.*, the latter bargained, sold, and assigned to *A.* the policy, and covenanted that, in case no money should be produced by the policy, he would, within one month after his return from the voyage which he was about to make to *India*, pay to *A.* a sum of money, which, when invested in stock, would produce an annuity equal in amount to five per cent. on the principal money produced by the sale of the stock: Held, that the deed did not require an *ad valorem* stamp, the transaction described in it not being a "sale" of an annuity within the meaning of the words in the 55 *G. 3. c. 184. sched. part 1.*, and the assignment of the policy not being a conveyance "of property" within the meaning of that word in the same statute.

defendant,

defendant, and one of the children of *E. R. Lewin*, was entitled to 2542*l.* 6*s.* 8*d.* 3 per cent. Consolidated Bank Annuities, part of the 3384*l.* 14*s.* Bank Annuities, immediately after the decease of *E. R. Lewin*, that *E. R. Lewin*, at the request of the defendant and *Amelia Ross*, his wife, consented that 1700*l.* 3 per cent. Consolidated Bank Annuities, part of the 3384*l.* 14*s.*, should be sold, and that the produce thereof should be paid to them, the defendant and *A. R.* his wife, in part satisfaction of the said sum of 2542*l.* 6*s.* 8*d.* Bank Annuities, to which *A. R. Herbert* was so entitled as aforesaid, upon having an annuity after the rate of 5 per cent. on the amount of the money arising from the sale of the sum of 1700*l.* 3 per cent. Consolidated Bank Annuities secured to her *E. R. Lewin* and her assigns during her life, by the bond and warrant of attorney of the defendant; that *H. Lewis*, at the special request of *E. R. Lewin* the defendant, and *A. R.* his wife, had sold out the sum of 1700*l.* 3 per cent. Consolidated Bank Annuities, part of the 3384*l.* 14*s.* of that stock, and paid the net produce thereof, amounting to 1288*l.* 14*s.* 9*d.*, to the defendant and *A. R.* his wife; and further reciting, that an annuity after the rate of 5 per cent. on the 1288*l.* 14*s.* 9*d.* would amount to 64*l.* 8*s.*; that the defendant had executed and given to *E. R. Lewin* a bond as in the same indenture mentioned, and that the payment of the annuity of 64*l.* 8*s.* was further secured by the warrant of attorney of the defendant; and that by a policy of insurance, dated the 23d of *February* 1826, the defendant had effected an insurance in the name of the said *A. J. Nash*, as his agent, from loss or damage on goods, specie, money lent on respondentia, or advanced on goods, or upon goods shipped in privilege home and out as therein mentioned, in eight several sums of 150*l.* each, and in
the

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the sum of 200*l.*, making in the whole the sum of 1400*l.*; and that for *better and more effectually securing to the said E. R. Lewin the payment of the said annuity of 64*l.* 8*s.**, the said defendant had agreed to assign to the said plaintiffs the thereinbefore recited policy of insurance, and all monies which should or might be received by virtue of the same, and to enter into the covenant thereafter contained, for payment to the said plaintiffs, upon the return of him the defendant from the voyage which he was then about to make to the *East Indies*; it was witnessed, that for better and more effectually securing the payment of the annuity of 64*l.* 8*s.*, and in consideration of the sum of 1288*l.* 14*s.* 9*d.*, the net produce of the sum of 1700*l.* 3 per cent. Consolidated Bank Annuities having been so paid to the defendant and *A. R.* his wife, he the said *A. J. Nash*, at the request and by the direction of the defendant, and upon the nomination of *E. R. Lewin*, bargained, sold, and assigned, and the defendant, upon the like nomination of *E. R. Lewin* testified as aforesaid, had bargained, sold, and assigned, and by the said indenture did bargain and sell to the plaintiffs the policy of assurance, and the eight several sums of 150*l.* each, and the sum of 200*l.* respectively assured thereby, and all the benefits of the policy; habendum, the policy, monies, and premises thereby assigned to the plaintiffs. And in pursuance and further performance of the said agreement, the defendant did thereby covenant and agree with and to the plaintiffs that, in case no sum of money should become payable and be received under or by virtue of the policy, then the defendant should, within one calendar month after his return from the voyage which he was then about to make to the *East Indies*,

Indies, well and truly pay to the plaintiffs such a sum of money as, when invested in the 3 per cent. Consolidated Bank Annuities, would produce the annual sum of 64*l.* 8*s.* Breach, non-payment of that money. Plea, non est factum. At the trial before *Park J.* at the Spring assizes for the county of *Berks* 1829, the deed declared on, when produced, appeared to be impressed with a common deed-stamp only. It was objected, on the part of the defendant, that it ought to have had an ad valorem stamp, inasmuch as the statute 55 *G. 3. c. 184. sched. part 1. tit. Conveyance*, required that "a conveyance, whether grant or assignment, &c. upon the sale of lands, *annuities*, or other *property* for and in respect of the principal or only deed or instrument, whereby the lands or other thing sold should be granted, assigned, or vested in the purchaser, where the purchase or consideration-money therein expressed should amount to 1000*l.*, and not to 2000*l.*, should be impressed with a stamp of 12*l.*;" and by a subsequent clause, "where upon the sale of any annuity the same is only secured by bond, warrant of attorney, covenant, or contract, the bond or instrument by which the same shall be secured, or some one of the instruments, if there be more than one, shall be deemed liable to the same duty as an actual grant or conveyance." It was contended, first, that the transaction described in the deed was the sale of an annuity; and, secondly, that the deed operated as an assignment of property, viz. of a policy of assurance, and that in either case an ad valorem stamp was necessary. The learned Judge directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit.

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against
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Taunton

1829. *Tannton* now moved accordingly. By the deed, *E. R. Lewin*, for whom the plaintiffs are trustees, agreed to give up the right to dividends which she was entitled to receive during her life, and the defendant, in consideration of being allowed to convert the principal stock into money, covenanted to pay the plaintiffs, for her use, an annuity equal in amount to 5 per cent. on the money produced by the sale of the stock. There was, therefore, a sale of an annuity by the defendant to *E. R. Lewin*, the price paid for the annuity being the value of her life-interest. But assuming that there was not a sale of an annuity, there was an assignment of property, for the defendant by the deed assigned a policy for more effectually securing the payment of the annuity. The deed (or the bond or warrant of attorney) ought to have had an ad valorem stamp. It was competent to the parties to affix the ad valorem stamp on any one of the instruments by which the annuity was secured. Neither the bond nor the warrant of attorney was produced, and it lay on the plaintiff to shew that some one of the instruments was properly stamped. The deed in question was not impressed with any stamp denoting that the ad valorem duty had been paid on the bond or warrant of attorney. [*Parke J.* That part of the schedule applies to cases where the purchase or consideration money is expressed in the deed. What is the purchase or consideration money expressed in the deed?] The value of the life-interest in 1700*l.* 3 per Cents. That is stated in the deed, though the amount be not calculated.

Lord TENTERDEN C. J. I am of opinion that the policy (no loss having occurred) cannot be considered
property

property within the meaning of the 55 G. 3. c. 184. *shed. part. 1.* It seems to me also that the transaction described in the deed cannot be considered a sale of an annuity in the ordinary sense and acceptance of the words; and the legislature must be taken to have used the words in their ordinary meaning and acceptance.

Rule refused.

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BLANDY
against
HEARNS.

BRAITHWAITE and Others *against* SKOFIELD and Others.

Wednesday,
May 18th.

ASSUMPSIT for work and labour, and materials.

Plea, the general issue. At the trial before *Bayley J.* at the last *Yorkshire* assizes, it appeared that the action was brought to recover the amount of a bill for plasterer's work done by the plaintiffs in some houses, on account of a society called "The *Latham's* Building Society." There was not any evidence that the defendants gave the order for this work, or that the plaintiffs knew them to be members of the society; nor did it appear that any interest in the land upon which the houses were built, or in the houses, had been conveyed to them. But it was proved that they had contributed to the funds of the society, and had been parties to a resolution that the houses, upon which the work in question was done, should be built. Under these circumstances the learned Judge thought the plaintiffs were entitled to a verdict, but gave the defendant leave to move to enter a nonsuit; and now

Where it was proved that *A. B.* had contributed to the funds of a building society, and had been present at a meeting of the society, and party to a resolution that certain houses should be built: Held, that this made him liable to an action for work done in building those houses, without proof that he had any actual interest in them, or in the land on which they were built.

Blackburne

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Blackburne moved accordingly, and contended that the case of *Vice v. Lady Anson* (a) was decisive in his favour. In that case the defendant had contributed to the funds of a mining company, and had represented herself as a shareholder; but as it did not appear that the plaintiffs had given credit to her, or that she had been a party to the order, it was held that they could not recover from her the value of goods furnished for carrying on the mining concern, without proving that she actually had an interest in the mine. So here the plaintiffs did not give credit to the defendants, nor did the defendants order the work to be done, nor was it proved that they had an interest in the houses.

Lord TENTERDEN C. J. The present case is very distinguishable from that which has been cited. There the plaintiffs could have no right to recover against the defendant except in respect of her having an interest in the mine, and they failed in the attempt to prove that interest. Here the plaintiffs had a right to be paid by those who employed them, and the defendants having joined in a resolution to build the houses, authorised the employment of the workmen. That circumstance, without reference to the title to the land upon which the houses were built, is sufficient to make the defendants liable to this action. The verdict was therefore right.

Rule refused.

(a) 7 B. & C. 409.

*as Lord. v. Spang 1. C. M. H. M.
- - Fountain. v. Boddle & L. B. R. P. 5.*

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CHILD *against* AFFLECK et Ux.

Wednesday,
May 13th.

CASE for a libel. Plea, the general issue. At the trial before Lord Tenterden C. J. at the *Westminster* sittings after *Hilary* term, it appeared in evidence that the plaintiff had been in the service of the defendants, Mrs. *Affleck* having before she hired her made inquiries of two persons, who gave her a good character. The plaintiff remained in that service a few months, and was afterwards hired by another person, who wrote to Mrs. *Affleck* for her character, and received the following answer, which was the alleged libel: — “ Mrs. *A.*’s compliments to Mrs. *S.*, and is sorry that in reply to her inquiries respecting *E. Child*, nothing can be in justice said in her favour. She lived with Mrs. *A.* but for a few weeks, in which short time she frequently conducted herself disgracefully; and Mrs. *A.* is concerned to add she has, since her dismissal, been credibly informed she has been and now is a prostitute in *Bury*.” In consequence of this letter the plaintiff was dismissed from her situation. It further appeared that after that letter was written, Mrs. *Affleck* went to the persons who had recommended the plaintiff to her, and made a similar statement to them. Upon this evidence it was contended, for the defendants, that there was no proof of malice, and that consequently the plaintiff must be nonsuited. On the other hand, it was urged that Mrs. *Affleck*’s statement of what the plaintiff’s conduct had been after she left her service was not privileged, and that, at all events, that part of the letter and the statement that

In an action for libel, it appeared that the defendant, with whom the plaintiff had lived as servant, in answer to inquiries respecting her character, wrote a letter imputing misconduct to her whilst in that service, and after she left it; and the defendant also made similar parol statements to two persons that had recommended the plaintiff to her: Held, that neither the letter itself nor the parol statements proved malice, and that, consequently, the letter was a privileged communication, and the plaintiff not entitled to recover.

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that she voluntarily made to other persons, and not in answer to any inquiries, were evidence of malice. Lord *Tenterden* C.J. was of opinion that the latter part of the letter was privileged, and that the other communications being made to persons who had recommended the plaintiff were not evidence of malice, and he directed a nonsuit.

F. Kelly now moved for a rule nisi for a new trial. The latter part of Mrs. *Affleck's* letter cannot be considered as a privileged communication. The inquiry made could only be respecting the plaintiff's conduct whilst in her service. The statement of her subsequent conduct was uncalled for, and being made without just cause, even supposing it to be without malice, still the plaintiff was entitled to a verdict, *Blackburn v. Blackburn* (a). But even if that part of the letter could, if written without malice, be considered as a privileged communication, still it was an officious statement, and therefore evidence of malice, *Rogers v. Clifton* (b); and where a bad character of a servant is given maliciously, the communication is not privileged, *Edmonson v. Stevenson* (c), and the party must be responsible unless he proves the truth of the statement. At all events, the statements to third persons made voluntarily, and not in answer to any inquiries, proved that Mrs. *A's* object was to injure the plaintiff; this, therefore, was evidence that the letter was malicious.

BAYLEY J. It appears to me that the letter complained of was a privileged communication, and that the nonsuit was right. In the case of *Rogers v. Clifton*, evidence of the falsehood of the imputations was given,

(a) 4 Bing. 395.

(b) 3 B. & P. 587.

(c) Bull. N. P. 8.

which

which, independently of the contents of the alleged libel, raised the question whether they had been written *bonâ fide*. Here there was no evidence of the good conduct of the plaintiff at the period to which the letter referred. It has been contended, that the letter should not have contained the statement of the alleged misconduct after the plaintiff left the defendant's service. But I think that Mrs. *Affleck* would have stopped short of her duty in withholding that information, and that she was not bound to disclose the names of the persons from whom she received it. Then reliance was placed upon the two parol communications made by Mrs. *Affleck*, as evidence of malice. But it appeared in evidence, that both the persons to whom they were made had recommended the plaintiff to her service; it was therefore very natural, and by no means malicious, in Mrs. *Affleck* to inform them of the plaintiff's misconduct.

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LITLEDALF J. It appears to me, that there was not any evidence of malice that ought to have been left to the jury. It is admitted that an answer to the inquiries made would not have been the subject-matter of an action, but it is contended, that the latter part of the letter is evidence of express malice. I think, however, that if Mrs. *Affleck* had received such information she was bound to state it, and, therefore, malice is not to be inferred from the letter itself. With regard to the other communications, the question is, whether they prove that Mrs. *Affleck* acted maliciously in writing the letter; I am of opinion that they do not; for the persons to whom they were made had recommended the plaintiff, and, therefore, a statement to them of her misconduct cannot be deemed an officious interference. If, indeed, the plaintiff had distinctly proved the falsehood of the state-

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ment, the case would have assumed a different shape, but, according to the case proved, the nonsuit was right.

PARKE J. The rule laid down by Lord *Mansfield*, in *Edmonson v. Stevenson*, has been followed ever since. It is, that in an action for defamation in giving a character of a servant, "the gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved." The question then is, whether the plaintiff in this case adduced evidence, which, if laid before a jury, could properly lead them to find express malice. That does not appear upon the face of the letter. *Primâ facie* it is fair, and undoubtedly a person asked as to the character of a servant may communicate all that is stated in that letter. Independently of the letter, there was no evidence except of the two persons that had recommended the plaintiff. The communication to them, therefore, was not officious, and Mrs. *Affleck* was justified in making it. In *Rogers v. Clifton*, evidence of the good conduct of the servant was given, and the communication also appeared to be officious. In *Blackburn v. Blackburn*, the occasion of writing the alleged libel did not distinctly appear, it was therefore properly left to the jury to say, whether it was confidential and privileged or not, and they found that it was not. Here the letter was undoubtedly *primâ facie* privileged, the plaintiff, therefore, was bound to prove express malice in order to take away the privilege.

LORD TENTERDEN C. J. I entirely concur in what has fallen from the rest of the Court, and think that the nonsuit ought not to be disturbed.

Rule refused.

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BATES *against* COOKE.Thursday,
May 14th.

DEBT upon an award. The first count of the declaration stated, that it had been agreed that certain differences between the parties should be referred to two persons, one to be chosen by each; "and in case the persons so named should disagree in their opinion, it should be competent to them to appoint an umpire, in the usual way of appointing a person in that capacity in articles of reference." The declaration then stated, that the plaintiff appointed *A. B.* and the defendant *C. D.* as arbitrators; that they not agreeing in their opinion, appointed *E. F.* as umpire; and that afterwards *A. B.*, *C. D.*, and *E. F.*, having taken all matters into consideration, awarded a certain sum to be paid to the plaintiff. There were other counts on the award, in substance the same, counts for goods sold and delivered, and the money counts. Pleas, nil debet and set off. At the trial before *Vaughan B.* at the last *Suffolk* assizes, it appeared in evidence, that as soon as the arbitrators were appointed, and before they had inquired into the matters referred to them, or differed in opinion, they appointed an umpire. The award was produced, and after reciting that *A. B.* and *C. D.* had been appointed arbitrators, and that they had appointed *E. F.* umpire upon the said arbitration, proceeded, "And we, the said arbitrators, have agreed and do award to the said *R. Bates* (the plaintiff) the sum of, &c. As witness our hands, *A. B.*, *C. D.*, *E. F.*" For the defendant, it was contended, arbitrators and the umpire: Held, that the latter by signing the award signed as his.

Where a submission to the award of two persons authorized the appointment of an umpire by them, if they should disagree: Held, that they might choose an umpire before they entered upon the enquiry. The declaration on the award made under this submission, after stating the choice of an umpire, alleged that the arbitrators and umpire made the award: Held, that taking the whole together, it was substantially an allegation that the umpire made the award. The award, after reciting that *A. B.* and *C. D.* had been appointed arbitrators, and that they had appointed *E. F.* umpire, proceeded, "We, the said arbitrators, do award," &c., and was signed by the two adopted the language as his.

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first, that the umpire was improperly appointed, the arbitrators not having power to make the appointment until they had investigated the matters referred, and found that their opinions differed. Secondly, that the award appeared to be made by the arbitrators originally appointed, and not by the umpire who alone had authority to make it; and, thirdly, that if it was to be taken as the award of the umpire, it was misdescribed in the declaration, for it was there stated to be the award of the three, and not of him only. The learned judge over-ruled the objections, but gave the defendant leave to move to enter a nonsuit. The plaintiff having obtained a verdict,

F. Kelly now moved accordingly, and urged the objections made at the trial; and he also contended that the damages were larger than the evidence warranted.

BAYLEY J. I am of opinion that we ought not to grant a rule for entering a nonsuit. The declaration states that the submission was to two persons, with power to appoint an umpire if they differed in opinion; and it appeared that they appointed an umpire in the first instance. That, however, is a very fair mode of making the appointment, in case it should be necessary to have his interference, and I do not think that any legal objection can be made to it. Then it is said that the declaration states the award to have been made by the three, but the context in the declaration shews it to have been in legal operation the award of the umpire only, and therefore it does, in substance, describe it as the award of the umpire; and *Soulsby v. Hodgson* (a) is

(a) 3 Burr. 1474.

an express authority that the award is not bad on account of the arbitrators having joined in making it. Another objection was, that the language of the award was that of the arbitrators, and not of the umpire; but he, by signing it, adopted that language as his own, and the award in legal operation became his. For these reasons, I think that the legal objections fail, and that no rule should be granted.

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LITLEDALE and PARKE J. concurred.

Rule for entering a nonsuit refused, but granted
for reducing the damages.

MOYSE and Another, Executors of MARGARET
SCOTT, *against* WHITAKER.

Thursday,
May 14th.

ASSUMPSIT on a promissory note made by the defendant, whereby he promised to pay on demand to *Margaret Scott* or order 100*l.* with lawful interest: and on the money counts. Plea, non assumpsit. At the trial before *Bayley J.*, at the last *Yorkshire* assizes, the note was produced and appeared to have a stamp of 3*s.* 6*d.* only, it was thereupon objected that this was insufficient, the note not falling within the second class of promissory notes mentioned in the 55 *G. 3. c. 184. sched. part 1.* The plaintiffs then gave in evidence two letters written by the defendant, admitting a debt due to *Margaret Scott*, but not mentioning any amount. The learned Judge thought that these letters entitled the plaintiffs at all events to a verdict with nominal damages, and he also over-ruled the objection to the stamp, and a verdict was taken for

A promissory note, payable to *A. B.*, or order, on demand, is within the second class of notes mentioned in the schedule to the 55 *G. 3. c. 184.* being a note payable in another manner than to bearer on demand, and not exceeding two months after date.

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—
 MOVER
 against
 WHITAKER.

the amount of the note, but he gave the defendant leave to move to reduce it to 1s.

Tomlinson now moved accordingly, and contended that the stamp was insufficient. The second class of promissory notes mentioned in the schedule to the stamp act is the only one in which a stamp of 8s. 6d. suffices for a note for 100l. And that class includes only notes payable in any other manner than to bearer on demand, but not exceeding two months after date, or sixty days after sight. This note certainly was not payable to bearer on demand, neither was the note mentioned in *Keates v. Whieldon* (a), and yet it was held not to be within this class. That note, as the present, was payable on demand, and, therefore, might or might not be payable more than two months after date. The Court must have considered that the class in question applies only to notes payable at some fixed time. Perhaps, too, they thought that the first class was intended to include all notes payable on demand, and that notes "payable to bearer on demand" are only mentioned as an example.

BAYLEY J. Upon looking at the statute in question, I am of opinion that this note comes within the second class there mentioned. The first class includes notes payable to bearer on demand, this note was not payable to bearer. The second class includes notes payable in any other manner than to bearer on demand, but not exceeding two months after date. The note in question was payable otherwise than to the bearer on demand.

(a) 8 B. & C. 7.

Then

Then does it exceed two months after date? If payable on demand, how can it be said to exceed two months? The fair construction of the statute is, to hold that this class includes all notes not necessarily exceeding two months.

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MOYER
against
WHITAKER.

LITTLEDALE J. concurred.

PARKE J. It appears to me perfectly clear that the note in question comes within the second division given in the schedule to the stamp act; and as to *Kentes v. Whieldon*, I am not by any means sure that if it were reconsidered the Court would come to the same conclusion as on the former occasion.

Rule refused.

PARRY *against* ABERDEIN.

Friday,
May 18th.

ACTION on a policy of insurance, dated 17th November 1823, on goods by the *Isabella*, at and from Trieste to Liverpool, including risk in boats and craft from shore to shore, with leave to load, land, and exchange goods without being deemed a deviation. The insurance was declared to be, 368*l.* on currants, valued at 54*l.* per ton; 350*l.* on red *Smyrna* raisins, 3*l.* 10*s.* per barrel; 132*l.* on black ditto, ditto, 1*l.* 15*s.* per barrel; 40*l.* on figs, ditto, ditto, 20*l.* per ton. On the 5th December the following memorandum was writ-

A vessel, having goods on board upon which an insurance was effected, but which were warranted free from average, unless general, was placed in so much danger by perils of the sea, that the crew deserted her in order to save their lives, and the owners of the goods,

upon receiving intelligence of this, gave notice of abandonment. A few days afterwards the vessel was found by some fishermen, and towed into port and repaired, but the goods (which were of a perishable nature) had been so much injured by the salt-water that they would not have been worth any thing if forwarded to the place of destination: Held, that the assured were entitled to recover for a total loss.

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PARRY
against
ABERDEIN.

ten on the policy, and subscribed by the defendant: "The sum insured on raisins by this policy is declared to be 642*l.* in place of 482*l.*, and the valuations for the red *Smyrna* 3*l.* 18*s.*, and for black ditto 2*l.* 14*s.* per barrel." The policy contained the usual warranty of "free from average unless general, or the ship should be stranded." The declaration alleged a total loss by the perils of the seas. The defendant paid the proper proportion of general average before the commencement of the action, amounting to 6*l.* 5*s.* 10*d.* per cent., and having pleaded the general issue, the cause came on to be tried before Lord *Tenterden* C. J., at the sittings after *Trinity* term 1826, when a verdict was found for the plaintiff, damages 153*l.* 17*s.* 8*d.*, subject to the opinion of this Court on the following case: —

The defendant subscribed the policy mentioned in the declaration for 200*l.* On the 16th of *November* 1823 the ship sailed from *Trieste* for *Liverpool*, with the goods specified in the policy on board, the property of the persons in whom the interest was alleged. On the following day she encountered a violent storm, which laid her upon her beam ends: three of her crew were drowned, and the remainder saved themselves by clinging to the foretop. On the 19th they were taken off by some fishermen, and carried into the port of *Ancona*. When they left the ship the whole of her hull was under water, except a small part of her bows. The master on his arrival at *Ancona* hired a boat to look after her, and on the 20th proceeded to sea for that purpose. On the 21st they picked up her long boat, and concluded from that circumstance that she had foundered; but as they were returning toward *Ancona* they saw some fishermen who had fallen in with the *Isabella*, and were then towing

towing her into the port of *Ancona*; she was in the same state as when the crew had abandoned her, the whole of her hull being under water except a small part of the bows. On the 22d she was towed in this condition into *Ancona*, and remained with her cargo in possession of the salvors, who instituted a claim of salvage in the Tribunal of Commerce of *Ancona*. The cargo was placed by the salvors in the government stores, and the master and the crew were not allowed to interfere in any manner with the landing of the cargo. The cargo had been entirely under water for eight days, and when landed was found considerably damaged by the salt water. After the cargo had been landed the crew were obliged to live on shore. She was delivered to the captain in the middle of *April*; no repairs were allowed to be done till the beginning of that month. She required new masts and sails, but her hull was not at all injured. She afterwards proceeded on a voyage to *Palermo*, and from thence to *London*. There was no other ship in which the cargo could have been forwarded to *England*; and if another ship could have been found when the cargo was landed at *Ancona*, it was so much injured by having been so long under water, that it would have been worth nothing at its port of destination. The cargo was sold by public auction about the middle of *April*, when security was given to the salvors: it was sold by the agent for *Lloyd's*, who also acted as agent for the ship; and the following is an account of the sums which the articles insured produced, and the charges upon them:—the raisins produced 39*l.* 15*s.* 9*d.*; less freight, 57*l.* 11*s.* 7*d.* The figs produced 19*s.* 7*d.*; less freight, 6*l.* 18*s.* 7*d.* The currants produced 268*l.* 6*s.* 4*d.*; less freight, 51*l.* 6*s.* 6*d.* The
salvors

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—
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salvors claimed 5000 dollars for salvage. The Tribunal, in the middle of *December*, decreed that they should be allowed 1200 dollars and expenses. The salvors appealed from this decree, but the same was confirmed in the month of *April* following. The assured, residing in *Liverpool*, having heard of what had befallen the ship, and before they heard of her being found again and towed into *Ancona*, gave directions for a notice of abandonment being served upon the underwriters. The notice was dated at *Liverpool* on the 11th of *December*, and was served on the 13th of that month in *London*, but the underwriters refused to accept the abandonment. On the 12th of *December* the ship was mentioned in *Lloyd's* list as having been brought into *Ancona* on the 24th *November*. The question for the opinion of the Court was, whether the plaintiff was entitled to recover.

Campbell for the plaintiff. There was an actual total loss in this case, when the crew were compelled to quit the ship and abandon her at sea. The assured, as soon as they received intelligence of this event, gave notice of the abandonment, and at that time the underwriters were liable to pay for a total loss. Nothing since done has varied their liability. The property insured has never been in a situation to be restored beneficially to the owners. If there had been a mere retardation of the voyage, the plaintiff could not claim for a total loss, notwithstanding the abandonment, *Anderson v. Wallis* (a); but where an actual total loss has once occurred, that cannot be redeemed unless the thing in-

(a) 2 M. & S. 240.

sured is restored beneficially, *Holdsworth v. Wise* (a). In *Thornley v. Hebson* (b) there never was a total loss; the ship was never deserted at sea.

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 PAERT
 against
 ASSURERS.

F. Pollock contra. It does not follow that the loss was a total loss, because the crew were justified in quitting the ship. The loss might, according to subsequent events, turn out total or partial only. The goods were warranted free from average, and, although undoubtedly much injured, they remained in specie, and the injury to them cannot make the loss total, *Thompson v. The Royal Exchange Assurance* (c). Neither can the loss of the voyage for the season give the assured a right to abandon and claim for a total loss, *Hunt v. The Royal Exchange Assurance* (d).

Cur. adv. vult.

LORD TENTERDEN C. J. now delivered the judgment of the Court; and, after stating the facts of the case, proceeded as follows:—

Upon this state of facts we are of opinion that the plaintiff is entitled to recover. This case is not distinguishable from the case of *Gernon v. The Royal Exchange* (e), or the case of *Holdsworth and Another v. Wise*, in both of which the plaintiffs recovered. The first of these cases was an insurance on sugar: the ship returned in a short time to the port of loading; the cargo was damaged, and not in a fit state to be sent to the place of destination, and the assured abandoned, the whole still remaining in specie, though deteriorated.

(a) 7 B. & C. 794.

(b) 2 B. & A. 515.

(c) 16 East, 214.

(d) 5 M. & S. 47.

(e) 6 Tunt. 383. 2 Marsh, 88.

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PARRY
against
ABRAHAM.

The second of those cases was an insurance on the ship: the ship sailed from *St. Andrews*, in *America*, to *England*, and received so much injury that the crew abandoned her, and were taken on board another vessel. On the next morning a third vessel met with her, and some men from it went on board and succeeded in taking her to *New York*, from which place she came to *Liverpool* charged with a heavy sum for salvage, and with another sum requisite to repair some injury received in going into *Liverpool*, the two sums together exceeding the value in the policy. There was an abandonment. The Court held the loss total on the desertion of the crew, and not turned into a partial loss by the subsequent events, the effect of which could be of no real benefit to the assured. In the case now before the Court the ship was deserted by her crew in the utmost distress; carried into a port out of the course of her voyage some days afterwards, and there, with her cargo, detained many months for salvage. The cargo (perishable goods) was so much damaged as not to be worth sending to the place of destination if a ship could be found, and none could be. The assured abandoned, after knowledge of the loss, and before intelligence of the subsequent facts arrived. Can any person say that the goods, although remaining in specie, were not as effectually lost to the assured when the ship was deserted as if they had then gone to the bottom of the sea, or that the subsequent events produced a restoration of them to the owners? This, therefore, is not a mere loss of the voyage and the adventure, but in reality a loss of the thing insured.

In the case of *Hunt v. The Royal Exchange Assurance Company* the ship put back to her port of loading; the principal part of her cargo being flour, was undamaged, and

and might have been sent to the place of destination by another ship at the end of three or four months; so that there was no actual loss of the cargo, and a delay only rather than a loss of the voyage.¹ It was held that this was not a case for abandonment; and also upon the particular facts that the abandonment was too late. In the case of *Thornley and Another v. Hebson* the ship, which was the subject of the insurance, sustained great damage on her voyage from *New York* to *Hull*, and the crew, exhausted with long fatigue, were taken on board another vessel, from which six fresh men went to her, and carried her to *Rhode Island*, where she was sold to pay the salvage. The assured resided at *New York*: they might have prevented the sale if they would have paid the salvage; and there was nothing to shew that they were unable to do so. They sent notice of abandonment as soon as they heard of the desertion of the crew, and before they knew that the vessel had arrived at *Rhode Island*. Under these circumstances, the Court thought there was not a total loss before the sale; and as the owners might have prevented the sale, they could not make the loss total by their own neglect. These last two cases, therefore, are very distinguishable from the present; and our judgment ought to be governed by the first two that I have referred to, and by the sound and legal principles on which they were decided.

The *postea* is to be delivered to the plaintiffs.

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against
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Saturday,
May 16th.

'The KING against TIZZARD.

In the borough of W. the town clerk is appointed by the mayor, aldermen, and bailiffs, to hold the office during their pleasure, with a salary, which they have power to alter in amount or withdraw altogether; and one of the town clerk's duties is to attend all corporate meetings of the mayor, aldermen, bailiffs, and burgesses, and draw up minutes of their proceedings under their inspection: Held. that the offices of alderman and town clerk are incompatible, and that an alderman, by accepting the latter, vacated the former office.

QUO warranto for usurping the office of alderman of the borough of *Weymouth*. Plea, that the late king by charter granted that in the borough there should be one mayor, an indefinite number of aldermen, two bailiffs, and twenty-four chief burgesses, and that every person having served the office of mayor, should become an alderman for life; that defendant in 1804 was duly appointed to and served the office of mayor, and so became an alderman. Replication, that by the said charter it was granted that the mayor, aldermen, bailiffs, and chief burgesses, might make bye-laws, and that they should have a recorder, and that the mayor, recorder, and bailiffs, or any two or more of them, of whom the mayor or recorder should be one, should hold sessions; and further, that the mayor, aldermen, bailiffs, burgesses, and commonalty, should have within the same borough one discreet and fit man, who should be, and be named the common clerk of the borough aforesaid, to continue in the same office during the pleasure of the mayor, aldermen, and bailiffs, of the borough; and that afterwards, and after defendant became an alderman as aforesaid, to wit, on, &c. the office of common clerk became vacant, and defendant, so being an alderman, was by the then mayor, aldermen, and bailiffs, nominated, elected, and appointed, for the common clerk of the borough and town aforesaid, to continue in the same during the pleasure of the mayor, aldermen, and bailiffs. That defendant took the oaths, and

and became and was common clerk, wherefore, &c. There were two other replications, in substance the same, and a fourth, which after stating the appointment of defendant to the office of common clerk, and his acceptance of the office, alleged, that at the time when the defendant was so elected and took upon himself the said office, a yearly salary of 10*l.* was payable and paid by the mayor, aldermen, bailiffs, burgesses, and commonalty, to the common clerk for the time being, subject to be increased, diminished, or withdrawn altogether, by the mayor, aldermen, and bailiffs, at their pleasure; and that the offices of alderman and town clerk being by reason of the premises incompatible with each other, defendant thereby then and there resigned and vacated his office of alderman. The fifth replication alleged that it was the duty of the common clerk to attend and be present as such common clerk at all corporate meetings of the mayor, aldermen, bailiffs, burgesses, and commonalty, and under their inspection and direction to draw up in their book minutes and entries of their resolutions and proceedings, and then averred that the offices were incompatible, &c. as before. Demurrer and joinder.

Follett in support of the demurrer. Three grounds are stated, on which the offices of alderman and common clerk are incompatible; first, that the aldermen vote at the election of the common clerk; secondly, that when the defendant was appointed, there was a salary annexed to the office, which might be varied in amount, or withdrawn, at the pleasure of the mayor, aldermen, and bailiffs; thirdly, that the clerk must attend corporate meetings, and take minutes of the business transacted.

In

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The King
against
TOWNSEND.

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The King
against
TINNARD.

In order to make out that two offices are incompatible with each other it must be shewn the duties to be performed by the person holding one office are inconsistent with the duties to be performed by the person holding the other; and it is further necessary that the duties should be of a public nature, so that the public would sustain an injury by the improper discharge of them, otherwise this Court will not interfere. Thus the same person cannot hold a ministerial and also a judicial office in the same court, nor can the same person discharge the duties of expending public money and auditing his own accounts. But there is no case deciding that a man may not hold two offices, because by virtue of the one he has a voice in the election to the other; nor because in the one capacity he may have a voice in fixing the remuneration that he is to receive in the other. A man may vote in his own favor at an election of members of parliament and at elections to most parish offices. He may present himself to a church. The number of aldermen here is indefinite, so that the influence of one in fixing the common clerk's salary is very trifling, and that is not a public duty. The aldermen are not justices, no objection, therefore, arises on account of the offices being one judicial and the other ministerial; nor can there be any reasonable objection to one member of any body being employed to take minutes of their proceedings. In *Com. Dig. Franchise*, (F 27.) it is said that the office of sworn clerk is void, if he be made an alderman; and *Dyer*, 332 b. is cited. That, however, is not a principal case, but one mentioned in the margin, where a town clerk had been elected alderman with a view to turning him out of the former place, the offices being incompatible; and he was restored

restored to it by the Court of K. B.: but the respective duties of the two offices are not mentioned. The *King v. Pateman* (a) more nearly resembles this case; but there the aldermen audited the town clerk's accounts, and they were judicial officers, and the town clerk acted ministerially under them. So also in *Milward v. Thatcher* (b), of the two offices held by the same person, one was judicial, the other ministerial.

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The King
against
TIZZARD.

Alderson, contra, was stopped by the Court.

LORD TENTERDEN C. J. I am of opinion that judgment must be given for the crown. The fifth replication shews that the common clerk has to attend corporate meetings, and take minutes of their proceedings. If that be not done faithfully, he may be amoved from his office, and upon that question he would have a vote in his character of alderman. Thus, then, he would fill the two incompatible situations of master and servant. That replication, therefore, is a good answer to the defendant's plea. Again, the fourth replication alleges that the common clerk has a yearly salary which may be varied in amount or altogether discontinued at the pleasure of the mayor, aldermen, and bailiffs. The defendant, as an alderman, would have to vote upon that question, which duty I think he is not competent to perform, being also the party to receive the salary. That replication, therefore, as well as the fifth, is a valid answer to the plea.

BAYLEY J. I think that the two offices are incompatible where the holder cannot in every instance dis-

(a) 2 T. R. 777.

(b) Id. 81.

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charge the duties of each. Now, in the two questions of amotion and salary, the town clerk is not competent to discharge the duty of an alderman. The acceptance of the second office, therefore, vacates the first.

LITTLEDALE J. I entirely concur, and entertain great doubts whether the holding of two offices by the same person is ever contemplated in the charters granted to corporations.

Judgment for the crown.

See Sumner v. Bence 10 Bing 426

Monday,
May 18th.

CLIFT and Another *against* GYE.

Where a plaintiff, with the consent of the bail to the sheriff, took a cognovit, with a stay of execution for a month: Held, that although the bail continued liable, the debt not having been paid, yet the plaintiff could not take proceedings against them without giving them notice that the cognovit was unsatisfied.

THE defendant in this case was arrested on a latitat, returnable on *Wednesday* next after fifteen days of *St. Hilary*, and gave bail to the sheriff. The defendant applied to the plaintiffs for time, who on the 31st of *January* asked the bail whether they would consent to it. The bail thereupon signed the following memorandum: — “We hereby consent to your taking the cognovit of the defendant in this action, with stay of execution for any period not exceeding one month from this day; and consent that your so doing shall not exonerate us from the responsibility which we have incurred from having become his bail.” The cognovit was accordingly taken with a stay of execution for a month. The money not being then paid, the plaintiffs, without giving any notice to the bail, took an assignment of the bail-bond, and issued writs against them. The bail to the sheriff then became bail above, justified, and ren-

rendered the defendant; and then applied to set aside the proceedings on the bail-bond with costs.

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CLIFF
against
GYLE

Fish shewed cause, and contended that this case differed from *Farmer v. Thorley* (a), inasmuch as the cognovit was in that case taken without communication with the bail, whereas here they expressly consented that their liability should continue notwithstanding the cognovit; and, therefore, when the time agreed upon had expired and the money remained unpaid, the bail were in the same situation as if the cognovit had never been taken, and were liable to be sued upon the bail-bond.

Campbell, contra, contended, that according to the doctrine laid down in *Farmer v. Thorley*, by taking the cognovit the plaintiffs admitted the defendant to be in Court, and that the bail were, therefore, discharged, inasmuch as there was no continuing breach of the condition of the bond. At all events, they were not bound to put in bail above until the plaintiffs gave notice that the defendant had not paid the money pursuant to the cognovit.

Lord TENTERDEN C. J. The rule laid down in *Farmer v. Thorley* is perfectly correct, when a cognovit has been taken without making the bail parties to the transaction. But here they enter into an agreement, the fair interpretation of which appears to be, that they shall remain liable notwithstanding the cognovit, but that the time for putting in bail above shall be enlarged. I think that the time for so doing cannot reasonably be

(a) 4 B. & A. 91.

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held to have expired, until they received notice that the cognovit was unsatisfied; the proceedings against the bail were, therefore, commenced too soon, and ought to be set aside, but without costs.

Rule absolute.

Tuesday,
 May 19th.

The KING against SALWAY.

By a charter of Queen *Elizabeth*, it was provided that vacancies in the common council of the borough of *L.* should be filled up by election out of the

"burgesses and inhabitants."

The charter was accepted, but the corporation afterwards elected burgesses, not being inhabitants, to the office of common councilmen, as they had done before. This charter, and all other franchises, were surrendered to *Car. II.*, and *W. & M.* by a charter of restoration granted that the corporation

should enjoy all franchises, elections, rights of election, &c. that they had previously enjoyed by virtue or pretence of any charter, or by any other lawful manner, right, or title: Held, that under the charter of *Elizabeth*, burgesses could not be elected to be common councilmen unless they were inhabitants; and that an usage to elect burgesses not inhabitants was repugnant to the charter; and could not be pleaded in explanation of it: Held, also, that the charter of *W. & M.* only restored such rights as had been lawfully exercised under or by pretence of former charters, and, therefore, did not enable the corporation to elect burgesses, not being inhabitants, to the office of common councilmen.

INFORMATION in the nature of a quo warranto, for usurping the office of common councilman of the town and borough of *Ludlow*. Pleas, first, that Queen *Elizabeth*, by her charter in the thirty-eighth year of her reign, granted and ordained that thenceforth there might and should be within the town and borough of *Ludlow* from time to time thirty-seven of the more discreet and honest burgesses and inhabitants of the same town and borough, who should be and be nominated the common council of the said town and borough, of which same thirty-seven burgesses and inhabitants twelve of the most honest and discreet should be nominated and reputed aldermen or principal burgesses of the town and borough aforesaid; and of which same twelve aldermen or principal burgesses and inhabitants one should yearly be elected to be chief bailiff of the same town and borough, and of which same thirty-seven, twenty-five (being the residue of the same number), together with the aforesaid twelve, should together be and be called

the

the common council of the town and borough aforesaid; and of which same twenty-five one should yearly be elected to be second bailiff of the town and borough aforesaid; and after thereby assigning, nominating, constituting, and making the persons therein named and specified to be the first and modern twelve aldermen or principal counsellors of the town and borough aforesaid, and other persons therein also named and specified, to be the first and modern twenty-five of the common council of the town and borough aforesaid; which same twenty-five, together with the aforesaid twelve aldermen, her majesty thereby declared should be and be called the common council of the town and borough aforesaid; and after declaring her will to be that the same twelve aldermen should be the principals and more worthy of the same council, the late queen willed, and by the said letters patent for her, her heirs and successors, granted that whenever it should happen that the aforesaid twelve aldermen or principal counsellors so as aforesaid nominated, or any of them, or the aforesaid twenty-five common counsellors so as aforesaid nominated, or any of them, should die or from their offices aforesaid for ill government in that behalf be removed, then and so often it should and might be lawful for the residue of the said twelve and twenty-five, being the common council of the town and borough aforesaid, or the major part of them, to elect, nominate, and prefer one or more other or others of the said number of the twenty-five *burgesses and inhabitants* of the town and borough aforesaid for the time being, in the place or places of any person or persons of the said number of twelve; and also one or more other or others of the *burgesses and inhabitants* of the town and

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borough aforesaid, in the place or places of any person or persons of the number of the aforesaid twenty-five so happening to die or be removed. The plea then stated that the charter was accepted, and the office of one of the twenty-five common councilmen was vacant, and defendant, then and there *being one of the burgesses of the town and borough aforesaid*, was duly elected to it. Second plea, that from time immemorial the burgesses of the town and borough of *Ludlow* have been and still are one body corporate; and during the said space of time have been called and known by the name of the bailiffs, burgesses, and commonalty of the town and borough of *Ludlow*; and that from time immemorial within the said town and borough there have been, and ought to have been, and still ought to be, divers, to wit, twelve aldermen or principal burgesses, and divers, to wit, twenty-five common councilmen of the said town and borough; and that for and during all that time, whenever the office of one of the said common councilmen hath become and been vacant, the said twelve aldermen, and residue of the said twenty-five common councilmen, or the major part of them for the time being, being lawfully assembled, have elected and chosen, and of right ought to have elected and chosen, and still, as and when there shall be any vacancy in the said number of twenty-five common councilmen, of right ought to elect and choose some one other *of the burgesses of the said town and borough* to become and be one of such twenty-five common councilmen of the same town and borough; that a vacancy happened in the office of one of the twenty-five common councilmen, and defendant, who was one other *of the burgesses of the said town and borough*, was duly elected to it, &c. Third plea,

plea, that the town and borough of *Ludlow* is an ancient town and borough, and that for 300 years and more the burgesses of the said town and borough have been a body corporate, by the name of the bailiffs, burgesses, and commonalty of the town and borough of *Ludlow*, and that for all the time in the information mentioned, there have been, and ought to have been, and still ought to be, twelve aldermen or principal burgesses, and twenty-five common councilmen of the said town and borough, &c.; and that heretofore, and whilst the burgesses of the said town and borough were such body politic as aforesaid, to wit, on the 19th *December*, 4 *W. & M.*, their said late majesties by letters patent (after reciting a surrender of all their franchises by the corporation in the 36 *Car. 2.*, and reciting also that a charter had been granted by *J. 2.*), granted, restored, and released to the burgesses and inhabitants of the town and borough of *Ludlow* aforesaid all and singular the liberties, privileges, powers, and immunities, franchises, &c. so surrendered, in as ample manner and form as the said bailiffs, burgesses, and commonalty or their predecessors had or enjoyed, or ought to have had or enjoyed the premises before the said surrender; and their said majesties did restore, confirm, and ratify to the said bailiffs, burgesses, and commonalty, amongst other things, all and singular the offices *and elections, nominations, and appointment of officers*, and the like liberties, &c. *as they had before the said surrender by reason or pretence of any charters (a), grants, or letters-patent by any of their said late majesties' progenitors or ancestors, late kings or queens of England, in any manner before the day of the date of the instrument or*

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against
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(a) In the original, "debuerunt uti virtute vel prætextu."

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surrender aforesaid made, granted, or confirmed *or by any other lawful manner* (a), right, or title, although the same or any or either of them had been forfeited, lost, or surrendered, and although the same or any or either of them had been misused or not used, abused, or discontinued, &c. And that for a long time, to wit, for the space of seventy years before, and at the time of the date and making of the said deed or instrument of surrender, the said bailiffs, burgesses, and commonalty of the town and borough aforesaid, *by reason or pretence of a certain charter before then granted to them, to wit, the said charter or letters-patent in the said first plea mentioned*, had used and enjoyed, and then did use and enjoy a certain power, franchise, election, and nomination, to wit, as follows: that is to say, that whenever the place or office of one of the said twenty-five common councilmen of the said town and borough became and was vacant, the said twelve aldermen of the said town and borough, and the residue of the said twenty-five common councilmen thereof, or the major part of the said aldermen and of the said twenty-five common councilmen of the said town and borough for the time being had, during the time last aforesaid, elected, nominated, and appointed, and at the time of the date of the said instrument of surrender were used to, and did elect, nominate, and appoint, and thence hitherto continually have elected, nominated, and appointed, and used and enjoyed the right, franchise, and privilege of electing, nominating, and appointing some one other *of the burgesses of the said town* and borough to become and be one of such twenty-five common councilmen of the said town and borough. Demurrer to the first plea,

(a) " Aut quocunque alio legali modo."

and

and joinder in demurrer. To the second plea, replication; first, that before the said election of the defendant the charter of Queen *Elizabeth* had been accepted, and at the time of that election was in full force, and by virtue thereof the aldermen and residue of the twenty-five common councilmen ought to have chosen some one other of the burgesses *and* inhabitants to the vacant office; traversing, that from time immemorial it has been the usage to elect one other of the burgesses to that office. Rejoinder, that such had been the immemorial usage. Similiter thereto. Second replication to second plea, that the aldermen and common councilmen were not lawfully assembled. Similiter. Third replication, that long before the supposed election of defendant, Queen *Elizabeth* by charter granted as in defendant's plea alleged; and that under and by virtue thereof, before and at the time of the election of defendant, whenever the office of one of the common councilmen became vacant, the aldermen and residue of the common councilmen had elected and ought to elect some one other of the burgesses of the town and borough, *being an inhabitant thereof*, to be a common councilman. Rejoinder, that since the granting of the charter of *Elizabeth* the aldermen and residue of the common councilmen had elected, and ought to elect, one other of the burgesses to the vacant office of common councilman. Demurrer and joinder. First replication to third plea, that the bailiffs, burgesses, and commonalty did not before, and at the time of the surrender in that plea mentioned, use and enjoy the franchise of electing to the vacant office of common councilman some one other of the burgesses of the said town. Similiter. Second replication to third plea, that at the time of
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making that surrender, the charter of *Elizabeth* was in full force. Demurrer and joinder. Third replication, that the aldermen and common councilmen were not duly assembled. Similiter.

Alderson in support of the demurrers for the crown. The substantial question in the case is this. What is the true construction of the charter of Queen *Elizabeth*? for if that is clear, usage cannot be resorted to in order to expound it. Now by that charter the first bailiff, twelve aldermen, and twenty-five common councilmen were appointed out of the *burgesses and inhabitants*, and it provided that vacancies in the body of aldermen should be filled up by election out of the twenty-five *burgesses and inhabitants*; and that any vacancy in the twenty-five should be filled up by election of one other of the *burgesses and inhabitants*. Those words are synonymous with "*burgesses being inhabitants*," or "*burgesses inhabiting*." No person, therefore, can be eligible under that charter to the office of common councilman, unless he answers the whole description of *burgess and inhabitant*; and it is admitted that this defendant was not an inhabitant at the time of his election. The case cannot be distinguished from *Rex v. Heath* (a): there the charter of *Exeter* required that the common councilmen should be elected "*de discretioribus civibus et inhabitantibus civitatis*;" and it was held that a freeman, not being an inhabitant, was ineligible. *Rex v. Greet* (b) is the converse of this: there it appeared that the jurats of *Queenborough* were by the charter eligible

(a) 1 *Barnard*. 416.(b) 8 *B. & C.* 363.

out of the burgesses or inhabitants, and it was held that an inhabitant, not being a burgess, was eligible, and that a replication, setting up an usage to elect the jurors out of the burgesses *being* inhabitants, as an explanation of the charter, was bad. *Rex v. Miller (a)* also shews that usage can be pleaded to explain a charter only where the language of it is ambiguous.

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Taunton contra. The first demurrer involves merely the construction of the charter of *Elizabeth*. The second raises the question, whether usage can be pleaded to explain the charter. The third introduces a question on the charter of *W. & M.*, differing from the two preceding. As to the charter of *Elizabeth*, the case of *Rex v. Heath* is not conclusive against the defendant, for the matter then in question before the Court was, whether a rule for a quo warranto information should be made absolute. Such rules are always granted where there is any doubt; and it appears by the proceedings in that case that an information was filed, and at last there was an issue whether *Heath* was an inhabitant as well as a burgess; but no further proceedings can be found, nor does it appear whether the issue was ever tried. [Lord *Tenterden* C. J. The defendant does not appear to have controverted the law as stated.] In ancient charters the word inhabitant is to be taken as synonymous with burgess, and not as imposing any qualification of personal residence. In old phraseology burgess *ex vi termini* means inhabitant. *Spelman's Glossary*. So in *Whitlock's Commentary on Parliamentary Writs*. "Burgesses are inhabitants and freemen of boroughs (b)."

(a) 6 T. R. 268.

(b) Vol. i. p. 500. Vol. ii. p. 95.

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[Lord *Tenterden* C. J. Without reference to any corporate character, a burgess is a mere townsman.] The words must be construed according to the import that they possessed at the time when the charter in which they occur was granted; and then burgess was merely synonymous with townsman, although now the word implies a member of a corporation, *Brady on Boroughs*, 84. [*Bayley* J. You contend that in this charter burgesses and inhabitants are synonymous: do you consider that the phrase requires the party elected to be an inhabitant?] When burgesses were first incorporated, they were the inhabitants of walled towns. Afterwards they were to be continued by succession, as if the charter had described them as burgesses only. In an anonymous case (a), respecting the city of *Gloucester*, a question was raised, whether persons not residing could be made freemen, and the Court held they might, although a charter of *Car. 2.* was granted to them as “*cives residentes et inhabitantes*,” and that was said to make no difference, for all incorporations were in that manner. When the perpetual leave of absence which freemen now make use of was first established, cannot be discovered, but absence has long ceased to be a ground of amotion. It cannot, then, be said, that the usage to elect burgesses, not being inhabitants, to the office of common-councilmen is absolutely inconsistent with the charter; and if so, *Rex v. The Mayor, &c. of Chester* (b) is a direct authority in favour of the plea of usage. Again in *Rex v. Williams* (c) it appeared that the charter of the borough of *Carmarthen* required that the mayor, &c. should be inhabitants and residents within the

(a) 1 *Barnard*. 157. (b) 1 *M. & S.* 101. (c) 2 *M. & S.* 141.

borough,

borough, on pain of forfeiting 100*l.*; and the Court held that this charter did not absolutely require residency as a qualification, but only, under a penalty. *Blankley v. Winstanley* (a), and *Gape v. Handley* (b), are strong authorities for the admissibility of usage to explain and even to control charters. Then the third plea states, that *W. & M.* by their charter of restoration, confirmed to this corporation all privileges that they had exercised by reason or pretence of any charter; and therefore, even supposing this mode of filling up vacancies in the common council not to be according to the charter of *Eliz.*, as it was done by pretence of that charter, it is now rendered legal by the charter of *W. & M.*

Alderson in reply. This case differs from *Rex v. The Mayor of Chester*, for there the charter enabled the corporation to elect their officers annually if they thought fit, but did not absolutely require it. This charter of *Eliz.* is imperative, and exactly like that which was before the Court in *Rex v. Heath*. As to *Rex v. Williams*, the decision proceeded entirely on the penalty, and if the party, not being an inhabitant, was either ineligible or subject to the penalty, the case is an authority against the present defendant; for it shews, that being a burgess does not satisfy the designation of burgess and inhabitant. Then as to the third plea, the charter of *W. & M.* only meant to confirm what had been lawfully done under former charters, although not strictly according to form; for after restoring and confirming all rights, elections, &c. enjoyed by reason or pretence of any charters, &c. it goes on, "or by any other lawful manner, right, or title." The election of a burgess, not being an inhabitant, to the

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(a) 5 T. R. 279.

(b) *Ib.* 288. n.

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office of common councilman, could not be lawfully made under pretence of the charter of *Eliz.*, and therefore, is not made lawful by the charter of *W. & M.*

Cur. adv. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court.

The first question raised upon this record depends entirely upon the construction of the charter of Queen *Elizabeth*, as set out in the defendant's first plea, being the charter by which, according to that plea, the office of common councilman was established in the borough, and under which the defendant claims to exercise the office. By this charter, power is given, in case of vacancies, to elect one or more of the burgesses and inhabitants of the borough to the vacant offices. The plea avers, that the defendant being a burgess was elected, but does not aver that he was an inhabitant also. And upon this there is a demurrer by the crown, so that the question is, whether a person, being a burgess, but not an inhabitant, is eligible to the office. And we are of opinion that he is not. It may be difficult to say in what precise sense the word burgess is to be understood, in very ancient charters; perhaps, construing those documents according to the usage which has long prevailed in different places, the sense may not always have been the same. In the present charter, the words are "burgesses and inhabitants;" and as there are in many corporations, perhaps in most, burgesses who are not resident in the borough, we think it must have been the intention of the queen in this case, that the common councilmen should be chosen, not from those who were burgesses only, or inhabitants only, but from

from those in whom the two characters of burgess and inhabitant are united. And this agrees with the opinion of the Court in the case of *The King v. Heath*.

This being, in our opinion, the plain meaning of the charter of Queen *Elizabeth*: the second question is, whether, assuming the borough to have been incorporated from time immemorial, having the same number of common councilmen as those appointed by the charter, and who, both before and since the charter, have been, in fact, elected from the burgesses, without regard to residence, such an election can be valid after acceptance of that charter. A usage, not inconsistent with a charter nor repugnant to it, may continue, notwithstanding the acceptance of a charter; but a usage, repugnant to the charter, cannot. And we are of opinion that the usage in the present case is repugnant to the charter, and that the charter, although it uses affirmative words only, and does not in terms prohibit the election of a burgess not being an inhabitant, does, in effect, amount to such a prohibition. And we think this is not like the case of the corporation of *Chester* (a), in which the charter only gave a power to elect the principal officers annually, which power had, in practice, been very rarely exercised; and Lord *Ellenborough* appears to have thought that a mere power to elect annually given to a corporation who might before elect for life, did not necessarily import that the power so given should be exercised at all times. Whereas the charter of *Eliz.* in this case, in our opinion, prescribes and fixes the character of the persons to be elected, and therefore necessarily excludes the election of persons not sustaining

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the character prescribed. In the *Chester* case also it is to be observed that the Court only refused a mandamus to elect, leaving the right of those officers who had held for more than a year to be questioned by a quo warranto, which would be the most proper mode of proceeding in a case of any doubt, because the judgment of the Court upon it would be thereby subject to the revision of a court of error, which could not be done on a peremptory mandamus.

The remaining question arises upon the construction and effect of the charter of restoration granted by *William & Mary* after a surrender of the charter of *Elizabeth*. The defendant contends, that the election of persons not possessing the character required by the charter of *Elizabeth*, (such elections having in fact been made for some long time before the surrender,) receives validity from the charter of restoration, under the general words, "by reason or pretence of any charter," assuming that a mode of election not consistent with a charter ought to be considered, under this instrument of restoration, as made by pretence of that charter. We think, however, that it cannot be so considered, and that the words, "by reason or pretence," followed as they are with the words, "any other lawful manner, right, or title," must be understood of matters not unlawfully done, nor inconsistent with the charter, to the pretence of which the matter is referred. The utmost effect that can in our opinion be given to the word "pretence" (*prætextus* is the word in the original *Latin*) in such a case, must be to exclude very scrupulous, nice, and subtle enquiry upon doubtful points, not to give validity to matters contrary to clear and unambiguous ordinances.

Judgment for the crown on all the demurrers.

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TUCK *against* TOOKE and Another.Tuesday,
May 19th.

(In Error.)

DEBT by *Tooke* and *Wright* on a bond for 1000*l.*, executed by defendant to them as trustees for one *Mary Juler*. Plea, first, non est factum. Secondly, solvit ad diem. Thirdly, solvit post diem. Fourthly, that after the bond was forfeited, and after the 1st of September 1825, defendant was a trader liable to the bankrupt laws, and became bankrupt, &c. (pleading the bankruptcy specially). And that defendant duly surrendered himself to the commission, and duly conformed himself to the statute then in force concerning bankrupts. And the said defendant further says, that afterwards, and after he had passed his last examination under the said commission, to wit, on, &c. a certain meeting of divers of the creditors of the defendant, whereof and of the purport whereof hereinafter mentioned, twenty-one days' notice had been theretofore duly given in the *London Gazette* according to the said statute, was duly had and held to the intent and purport that they, the said last-mentioned creditors, should

To debt on bond, defendant pleaded, that after the bond was executed he became bankrupt; that nine tenths of the creditors assembled at two meetings, called pursuant to the 6 G. 4. c. 16. s. 133., had agreed to accept a composition, whereupon the commission was superseded, and that he had been always ready, and offered, to pay the composition to the plaintiffs; but did not aver that the plaintiffs were present at the meetings, or had agreed to take the composition, or had proved under the com-

mission: Held, that the plea was not an answer to the action.

Defendant further pleaded, that before the bond was executed he was indebted to *M. J.* and various other persons, and being insolvent, agreed with them to pay a composition, and they agreed to release him. That several creditors relying on that agreement executed a release. That plaintiffs afterwards as trustees for *M. J.* obtained and accepted for the residue of the debt the bond in question, by fraud and covin, without the knowledge or consent, and in fraud of the other creditors. Replication, that the bond was not obtained by fraud and covin as alleged. The jury having found this issue for the defendant, judgment non obstante veredicto was entered up for the plaintiff in C. P.: Held, on writ of error, that the facts alleged did not shew fraud and covin, inasmuch as it did not appear that the giving of the bond was connected with the agreement for the composition; and that the defendant could not give evidence of any other fraud but that which he had averred.

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decide upon accepting or refusing a certain offer of composition or security for such composition hereinafter next mentioned. And the defendant, together with *William Fox Juler*, a friend of the defendant, did then and there offer to the said creditors of the defendant then and there assembled, and to all other the then creditors of the defendant, a certain composition and security for the same upon the amount of their respective debts; that is to say, the sum of 6s. in the pound on the amount of their several debts due and owing from him to them respectively, to be paid and secured as follows, to wit, &c.; which said composition and security the whole of the said creditors then and there assembled as aforesaid did then and there agree to accept respectively. And this defendant further says, that afterwards, and after the said last-mentioned meeting, to wit, on the twentieth day of *June* 1826, a certain other meeting of divers creditors of the defendant was duly had and held for the purpose of deciding upon the said offer of composition and security so made as aforesaid, the same having been appointed at the said meeting of creditors first above mentioned, and twenty-one days' notice thereof, and of the purport thereof having been duly given in the *London Gazette*, and at which said last-mentioned meeting the whole of the creditors of the defendant then and there present did also agree to accept, and did then and there accordingly accept for themselves and all others the then creditors of the defendant the said composition and security upon the amount of their several debts respectively; whereof the plaintiff afterwards, to wit, on, &c. had notice, to wit, at, &c. And the defendant further says, that afterwards, to wit, on the 14th day of *August*, in the year

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1826, the said acceptance of the said offer having been duly and according to the statute testified by the said creditors in writing, the Lord Chancellor superseded the commission. And the defendant further says, that upon the acceptance of the said composition by the creditors as last aforesaid, to wit, on the said 20th day of *June* 1826, the defendant was, and from thence hitherto hath been and still is ready and willing, and then and there tendered and offered to pay and give to the plaintiffs the said composition, and security for the same. Fifthly, a special plea of fraud and covin, upon which issue was taken. Sixthly, that before the making of the said supposed writing obligatory and condition, to wit, on the 24th day of *December*, in the year of our Lord 1818, the defendant was indebted to the said *Mary Juler* in a certain large sum of money, to wit, the sum of 810*l.*, together with certain interest due to the said *Mary Juler* thereon, and also to divers other persons in divers other large sums of money. And the defendant having before that time become embarrassed in his circumstances, and unable to pay *Mary Juler* and his other creditors their just debts, in consideration whereof, and that certain friends and relations of the defendant had agreed to assist him the defendant in and about the paying a certain composition upon his debts, it had been agreed by and between the defendant and *Mary Juler*, and the other creditors of the defendant respectively, that she, *Mary Juler*, and the said other creditors, would accept and receive a composition then and there specified and agreed upon, upon the amount of their several debts, and would thereupon release and discharge the defendant from all claims and demands in respect thereof. And the defendant further says, that

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afterwards, to wit, on, &c. at, &c. divers of the creditors of the defendant, confiding in the said agreement, did receive of and from the defendant the last-mentioned composition upon their respective debts, and did thereupon, in pursuance of the agreement, by a certain indenture sealed with their respective seals, and bearing date a certain day and year therein mentioned, to wit, the day and year last aforesaid, acquit, release, and for ever discharge the defendant of and from their several and respective debts and claims upon him the defendant in respect thereof, whereof *Mary Juler* then and there had notice. And the defendant further says, afterwards, to wit, on the said 11th day of *October*, in the year of our Lord 1820, to wit, at, &c. the said supposed writing obligatory was obtained by the plaintiffs in trust as aforesaid from the defendant by fraud and covin, that is to say, that the plaintiffs, at the request of *Mary Juler*, obtained, accepted, and received the same of the defendant in trust as aforesaid, to secure to the plaintiffs, in trust as aforesaid, the residue of the said debt and interest thereon, then due from the defendant to *Mary Juler*, deducting the amount of the said composition upon the amount thereof as last aforesaid; corruptly, unlawfully, and without the knowledge or consent, and in fraud of the other creditors of the defendant as aforesaid, and not otherwise howsoever, and this he is ready to verify; wherefore, &c. The plaintiffs took issue on the first three pleas; and to the fourth replied, that the plaintiffs were not, nor was either of them present at the meetings in that plea mentioned, or at either of them; nor had the plaintiffs, at the times when those meetings were held, proved any debt under the commission in that plea mentioned. And that the plaintiffs did not
ever

ever accept, or agree to accept, the offer of composition and security in that plea mentioned, concluding with a verification. To the fifth plea they replied, that the bond was taken, accepted, and received by the plaintiffs of and from the defendant fairly and honestly, and not in the corrupt manner alleged in that plea. To the sixth plea, that the bond was obtained by the plaintiffs from the defendant fairly and honestly, and not by fraud or covin in manner and form as the defendant hath alleged. Similiter to the replications to the fifth and sixth pleas, and to the replication to the fourth plea; Rejoinder, that the plaintiffs did accept and agree to accept the offer of composition and security in the fourth plea mentioned, and issue thereon. At the trial before *Best* C. J. of the Common Pleas, the jury found all the issues for the plaintiffs, except that joined on the replication to the sixth plea, as to which, they found that the writing obligatory was not obtained by the plaintiffs from the defendant fairly and honestly, but by fraud and covin, in manner and form as the defendant hath in his sixth plea in that behalf alleged. Judgment, non obstante veredicto was afterwards entered by the court below for the plaintiffs on that as well as the other issues, and a writ of error brought, which was now argued by

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F. Kelly for the plaintiff in error. There are two questions in this case; one, whether the fourth plea is a good bar to the action; the other, whether judgment was properly entered up for the plaintiffs in the court below, notwithstanding the verdict for the defendant on the sixth plea. The facts disclosed in that plea constitute a fraud in law, and were, therefore, a sufficient answer

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to the action. It alleges that all the creditors of the defendant below, met together and agreed to take a composition, that many actually received it, and confiding in the resolution by all the creditors to take the same, executed a release, and afterwards the defendant gave to one of the creditors a bond for the residue of the debt due to her. Now the principle that pervades all the cases on the point, is this, that where a general composition with creditors is made, any agreement for a secret advantage to be given to one over the others, is fraudulent and void. In *Lord Chesterfield v. Jansen* (a), the Lord Chancellor says, "In like manner where a debtor enters into an agreement with a particular creditor for a composition of 10s. in the pound, provided the rest of the creditors agree, and this creditor at the same time makes a private clandestine agreement for his whole debt, though no particular fraud to the debtor, yet, as it is a fraud on the creditors in general, who entered into the agreement on a supposition the composition would be equal to them all, the Court has relieved." And this principle was adopted by this Court in *Cockshott v. Bennett* (b), and a security given to one for the whole of his debt, held void. Here the release was not executed by *Mary Juler* before the bond was given, and as the date alleged as the time of agreeing to give the bond is not material, the agreement for it may, for any thing that appears, have been entered into immediately after the agreement for the composition. But supposing that the facts alleged do not constitute a fraud, that is not material; the plea alleges that the bond was obtained by fraud, that is the material part of it, and that was traversed and found for the defendant.

(a) 1 Atk. 352.

(b) 2 T. R. 763.

A general plea of fraud and covin is good, *Hill v. Montague* (a), where Lord *Ellenborough* points out this distinction between pleas of usury, and fraud and covin. The facts stated in the plea in question, are merely inducement, and are not alleged as the fraud complained of. [Lord *Tenterden* C. J. Without the inducement, your plea would be good for nothing. *Littledale* J. A general plea that the bond was obtained by fraud, would be good, but a general plea that it was obtained in fraud of creditors would not.] In *Hancock v. Prowd* (b), the defendant, an administrator, had pleaded a judgment debt outstanding, the plaintiff replied that the money had been paid, and that defendant deferred procuring an acknowledgment of satisfaction, with the intention to defraud the plaintiff; and in the note it is said, that the averment of fraud was the material part, and that the payment of the money was merely inducement and not traversable, and that the defendant must traverse the fraud; and it was so held in *Veale v. Gatesdon*. (c) The question arising on the fourth plea, depends on the 6 G. 4. c. 16. s. 133. That section does not require that each creditor should have a particular notice of the meetings, or that every one should attend, but if a certain proportion of those present agree to a composition, the commission is to be superseded. A supersedeas obtained under such circumstances, ought to have the same effect as a certificate.

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Campbell, contra, was stopped by the Court.

LORD TENTERDEN C. J. All that the 133d section enacts is, that when a certain proportion of the creditors

(a) 2 M. & S. 377.

(b) 1 Saund. 328.

(c) Sir W. Jones, 92.

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agree to take a composition, the Lord Chancellor may supersede the commission. It does not at all interfere with the rights or securities of persons not parties to the agreement. The fourth plea is, therefore, no answer to the action, and we come to the first point made in argument. I quite agree with all the cases that have been cited, as to unfair advantages obtained by one creditor over others; and I think that we ought not to allow the effect of them to be avoided by nice distinctions. But the principle of them is this: that if one creditor, at the time when he manifests to others that he is about to take a composition, makes a secret bargain that he shall have more, that bargain is void. I do not find in this plea any allegation, that at the time of the agreement with *Mary Juler* touching the composition, any such separate bargain was made by her or on her behalf. The agreement to take the composition, and the subsequent giving of the bond, are alleged as perfectly distinct and separate matters, and the principle of former decisions does not apply to defeat that arrangement. This is my opinion on the facts alleged in the plea; but reliance is placed on the finding of the jury, and it is contended, that we ought to reject the preceding matter, and consider this as a general plea of fraud and covin. But if that could be done, a party might allege that a bond was void for one reason, and prove it so for another. It would be very dangerous to allow a security of so high a nature as a bond to be avoided in such a manner. I therefore think, that the defendant was bound to prove the bond void for the reasons stated; and as he could not do that, the verdict found in his favour was unavailing, and the judgment of the court below correct.

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RAYLEY J. In a plea of this description, I think the defendant ought to allege the nature of the fraud imputed, and if traversed, to prove it as alleged. If *Mary Jeler*, at the time when she agreed for the composition, had bargained for the additional security also, that would have been a fraud upon the other creditors. But the plea in question is vitious throughout. It does not state that *Mary Jeler* knew that other creditors were making a composition, nor that the other creditors knew she was agreeing for a composition; nor does it appear that she ever had an opportunity of receiving the composition-money. Then, in stating the subsequent bargain, it is not averred that the bond was obtained by means of any threats or pressure on the defendant. For these reasons I think that the facts alleged in the plea do not shew any fraud, and that the judgment below was right.

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LITTLEDALE J. The facts stated do not amount to a fraud on the other creditors. I agree that the day alleged as the time when the bond was given is not material, but we must take it to have been given after the agreement for the composition; and unless it was part of the same agreement it was not a fraud. The plea, therefore, does not allege that which amounts to fraud and covin; and I think the defendant was restrained to the proof of that which he alleged.

PARKE J. I am entirely of the same opinion. By the frame of the plea, the defendant was bound to rely upon the particular fraud alleged. Now it is consistent with all the facts stated, that the giving of the bond was wholly unconnected with the agreement for the composition.

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sition. As to the other point, if the 133d section is binding upon any persons not present at the meetings therein mentioned, it can only be so upon those who have proved under the commission; all the others remain in the same situation as before. It does not appear that *Mary Juler* proved, and, therefore, the fourth plea is no answer to the action. For these reasons the judgment in favour of the plaintiffs below was right.

Judgment affirmed (a).

(a) See *Harris v. Mantle*, 3 T. R. 307.

Tuesday,
May 19th.

Ex parte SUSANNAH SCOTT.

Where a party against whom a true bill for perjury had been found, and a warrant for her apprehension granted, was apprehended abroad and brought here in custody, and committed to prison for want of bail, the Court refused to discharge her, on the ground that she had been improperly apprehended in the foreign country.

A RULE nisi had been obtained for a habeas corpus to bring up *S. Scott* in the custody of the marshal, in order that she might be discharged. It appeared by the affidavits that a bill of indictment for perjury had been found against her, and on the 11th of *February*, Lord *Tenterden* C. J. granted a warrant for her apprehension, in order that she might appear and plead to the indictment, &c. *Ruthven*, a police officer, to whom the warrant was specially directed, apprehended *Scott* at *Brussels*; she applied to the *English* ambassador there for assistance, but he refused to interfere, and *Ruthven* conveyed her to *Ostend*, and thence to *England*, and on the 9th of *April*, she was brought before Lord *Tenterden*, and by him committed to the K. B. prison.

Brougham and *Platt* shewed cause. A true bill having been found against the prisoner for a misdemeanor,

meanor, there is no doubt that she is now rightfully in custody for want of bail. And when a party is liable to be detained on a criminal charge, the Court will not inquire into the manner in which the caption was effected, *Rex v. Marks* (a), *Ex parte Krans* (b). On the return to a writ of habeas corpus, the gaoler is only bound to shew the warrant for the detention of the party, and not the caption. On this point, a distinction has always existed between the practice in civil and criminal cases. In the former, the Court inquire into the manner in which the arrest was effected, and if that was improper, they discharge the party, *Lyford v. Tyrrel* (c), *Spence v. Stuart* (d).

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Ex parte
Scott.

Chitty, contra. In civil cases, the rule laid down in those cited has always been adhered to; and although in *Rex v. Marks*, and *Ex parte Krans*, the Court refused to discharge parties brought before them, on account of a defect in the commitment, it is to be observed, that in each of those cases the prisoners were charged with felony. This is the case of a misdemeanor only, and in favour of the liberty of the subject the Court ought to refuse to extend the rule established as to charges of felony. If it be extended to this, it must be held applicable even to cases of common assault. In *The Attorney General v. Cass* (e), which was an information really at the suit of the crown, the Court of Exchequer did interfere.

Lord TENTERDEN C. J. That was the case of an information for penalties, and rather in the nature of a

(a) 3 East, 157.

(b) 1 B. & C. 258.

(c) 1 Anstr. 85.

(d) 3 East, 89.

(e) 11 Price, 845.

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*Ex parte
Scott.*

civil proceeding to recover a debt, than of a criminal one, to punish an offence against the public. I consider the present question to be the same as if the party were now brought into Court under the warrant granted for her apprehension; she ought not to sustain any prejudice from the circumstance of her having been committed by me to the custody of the marshal. The question, therefore, is this, whether if a person charged with a crime is found in this country, it is the duty of the Court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them. If the act complained of were done against the law of the foreign country, that country might have vindicated its own law. If it gave her a right of action, she may sue upon it. I am not, indeed, aware of any cases where the government of a foreign country has interposed, in order that a person might be brought here on a charge of misdemeanor. In cases of felony, I know it has been done; I have granted a warrant for the apprehension of the party accused, and I do not know how, for this purpose, to distinguish between one class of crimes and another. It has been urged that the same principle will warrant an arrest in the case of a common assault. That certainly will follow, but there is little danger that a foreign country would allow such an arrest, and if the party making it is guilty of misconduct, the verdict of a jury will teach him not to repeat it. For these reasons, I am of opinion that the rule must be discharged.

Rule discharged.

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ROBINSON *against* HENRY READ.Tuesday,
May 19th.

THIS was an action of assumpsit for board and lodging, clothing, medicine, and necessities provided by plaintiff for the defendant, and for goods sold and delivered. The defendant pleaded the general issue. At the trial before Lord Tenterden C. J., at the *London* sittings before *Michaelmas* term, 1827, a verdict was found for the plaintiff, damages 216*l.* 17*s.* 10*d.*, subject to the opinion of this Court on the following case:— The defendant in the month of *October* 1825, was and is owner of the *East India* ship called the *Providence*, which arrived from the *East Indies* in that month, with several *Lascars* who had served on board on the voyage, and whom the first officer in the ship, by the order of *Edmund Read*, the brother of the defendant, and who was employed by him as broker and ship's husband for the said ship, and in that character received the freight and earnings of the said ship, delivered to the plaintiff to be fed and clothed and taken care of, till a ship should be provided to take them back to *India*, and on that account a debt was incurred amounting to 146*l.* 16*s.* The said *Edmund Read*, as such broker and ship's husband, also purchased for the use of the ship, slops, bedding, and seamen's clothing to the amount of 77*l.* 13*s.* 5*d.* After these supplies, the plaintiff delivered to the said *Edmund Read* his two bills for the said amounts, headed respectively as follows:—

Where a tradesman who had supplied goods to a ship sent in his account to the owner's agent and ship's husband, and took his acceptance at three months for the amount, deducting discount for that time, which was the usual credit, and when the bill became due consented to a renewal of it, adding interest, and in like manner took a third acceptance, which was dishonoured, and the agent soon afterwards failed; the balance in his hands in favour of his principal (the shipowner) having during all this time exceeded the amount of the bill, which was, however, unknown to the principal, who had never inspected the agent's accounts: Held, that the tradesman might sue the ship owner

for the amount of his claim, and that it was not discharged by the acceptance of the agent.

“ *Decem-*

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 ROBINSON
 against
 READ.

" December 26, 1825.

" The Captain and Owners of the *East India Ship Providence*."

" To FRANCIS ROBINSON."

Here followed the items of the bills, the whole amounting to 224*l.* 9*s.* 5*d.* About the same time the plaintiff had an account against the captain and owners of the *East India ship Darius*, and who were indebted to him in 44*l.* 7*s.* 10*d.* The said *Edmund Read* was also broker and agent for the said ship.

A credit of two or three months is usual on such accounts, and the dealings upon which the plaintiff's demand arose was upon such credit. Before the expiration of such credit, as to any part of the demand, the plaintiff came to *Edmund Read*, and said it would be an accommodation to him, the plaintiff, if *Edmund Read* would give him an acceptance for the amount of all the bills, in preference to waiting till they were due. *Edmund Read* agreed to give his acceptance accordingly, on discount being allowed, and the plaintiff deducted, by way of discount, from the 224*l.* 9*s.* 5*d.* the sum of 8*l.* 3*s.* 7*d.*, reducing the demand to 216*l.* 5*s.* 10*d.*

Discount was likewise allowed by the plaintiff upon the demand in respect of the *Darius*, reducing the aggregate of the demand, in respect of both ships, from 268*l.* 10*s.* to 257*l.* 16*s.* 1*d.*; and for this amount *Edmund Read*, at the request of the plaintiff, accepted a bill of exchange drawn on him by the plaintiff, of which the following is a copy:—

" £257 16*s.* 1*d.*

" London, December 28, 1825.

" Three months after date, pay to my order two hundred

hundred and fifty-seven pounds sixteen shillings and a penny, for value received.

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“ F. ROBINSON.”

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against
READ.

“ To Mr. *Edmund Read*.”

When *Edmund Read* gave the plaintiff the said acceptance, he had money in his hands belonging to the defendant to a much larger amount than sufficient to pay the plaintiff's demand. *Edmund Read* then debited the defendant's account with the said sum of 216*l.* 5*s.* 10*d.* but it did not appear that the defendant had seen the books.

On the 31st *March* 1826, when this bill of exchange became due, *Edmund Read* requested the plaintiff to renew it, which the plaintiff agreed to do, interest being added. *Edmund Read* consented to add interest, and accordingly he accepted a bill at three months, in the same form as the other.

When the second bill became due, it was in like manner renewed for two months, on an agreement to add interest.

At the time of the acceptance of the second, and also of the third bill, the balance in the hands of *Edmund Read* in favour of the defendant had increased. He did not debit the defendant with any interest, and he failed soon after the third bill fell due, and was made a bankrupt, and then owed the defendant 5000*l.*

Before the third bill became due the plaintiff indorsed it for value to one *Francis*, and the bill being dishonoured when due, *Francis* brought an action, and arrested *Edmund Read* upon it. *Edmund Read* put in and justified bail.

Edmund Read in *October* 1826 became a bankrupt,
and

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and afterwards obtained his certificate, whereupon the plaintiff took up the bill, and paid *Francis* the principal money, interest, and costs, incurred before the commencement of this action.

After the bankruptcy of *Edmund Read* the defendant was applied to by the plaintiff's attorney for the payment of the plaintiff's accounts, when the defendant said he knew nothing about them, for that he left all matters relating to the ship to his brother *Edmund Read*, who was then making up his accounts. He desired the matter might stand over till the accounts were made up, and if found to be right would be paid.

Chitty for the plaintiff. The debt originally due from the defendant to the plaintiff was not discharged by the bills accepted by the defendant's agent. It is true, that the agent had money of the defendant's in his hands, but the latter never inspected the accounts, nor made any enquiry as to what the agent was doing with his money. He did not, therefore, give any new credit to the agent in consequence of his having accepted the bills in question, nor did he sustain any prejudice in consequence of the plaintiff having consented to a renewal of the bill originally given. *Wyatt v. The Marquis of Hertford* (a) is therefore a direct authority for the plaintiff. Neither can it be said that the plaintiff voluntarily took a bill in payment instead of cash, as was the case in *Strong v. Hart* (b); he asked for a bill, but that was in order to have the advantage of negotiating it before the time of credit expired, and before he could demand payment in cash, the bill therefore did not operate as pay-

(a) 3 East, 147.

(b) 6 B. & C. 160.

ment, *Tapley v. Martens* (a), *Marsh v. Pedder* (b), *Everett v. Collins* (c).

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Campbell contra. It is a general principle, that if the agent of a debtor have funds in his hands, and the creditor, for his own accommodation, voluntarily takes a security from the agent, or gives credit to the agent who afterwards fails, having in his hands funds of the debtor adequate to the payment of the demand, the liability of the original debtor is thereby discharged. Under such circumstances, it is considered that there has been an appropriation of the debtor's money in the hands of the agent to the creditor, and the agent from that time becomes the debtor. Here *Edmund Read* was not the agent to give security after the time for giving credit expired, but to pay in cash at that time. The bill originally taken was not due until after the expiration of the credit, and was twice renewed; it was at first given at the plaintiff's request and for his accommodation, and therefore operated to discharge the defendant. In *Tapley v. Martens*, and *Marsh v. Pedder*, there was no proof that the bill was given to accommodate the creditor. In *Strong v. Hart*, and *Smith v. Ferrand* (d), where there was such evidence, it was held to operate as payment. If *Everett v. Collins* (e) can be supported at all, it must be on the ground that the cheque there given was to be paid immediately, and being dishonoured, could no more operate as payment than bad sovereigns, had the agent affected to pay in cash. In *Evans v. Drummond* (g), it appeared that the plaintiff having dealt

(a) 8 T. R. 451.

(b) 4 Campb. 257.

(c) 2 Campb. 515.

(d) 7 B. & C. 19.

(e) 2 Campb. 515.

(g) 4 Esp. 89.

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with two partners, took their joint acceptance for his demand, and afterwards, in renewal of it, took the acceptance of one only, and this was held to discharge the other. *Reed v. White* (a) is expressly in point. There the plaintiff, having furnished goods to a ship, took the bill of *White*, who was the ship's husband, for the amount, and renewed it twice, and it was held that he thereby adopted *White* as the debtor, and discharged his co-owners.

LORD TENTERDEN C. J. It does not appear that the defendant sustained any injury in consequence of the plaintiff's having taken the bill from *Edmund Reed*. He never looked into the accounts, nor enquired how the agent was using his money. Then the single question is, whether this mode of dealing discharges the principal; or, in other words, whether the agent has paid the debt. The case of *Strong v. Hart* is the only one to that effect, and is perfectly distinguishable from this, for there it was taken for granted that the party might have had money if he had elected to do so. Here he had no option of that kind, he was originally obliged to pay for the bill by allowing discount, and could not get money; nor could he when the bill was at maturity obtain any thing but a renewal of the bill. By this course of dealing the plaintiff has obtained no advantage, and the defendant has sustained no prejudice. I am, therefore, of opinion that the plaintiff is entitled to recover.

BAYLEY J. I presume that Mr. *Campbell*, at the beginning of his argument, referred to the case of

(a) 5 Esp. 122.

Rambleton v. Bremer (a), but it is distinguishable from this; there the creditor having applied to his debtor for payment, was referred to a debtor of the debtor, and to this person he gave indulgence without the knowledge of the principal debtor, and by that indulgence the debt was lost. Upon the authority of *Tapley v. Martens*, *Marsh v. Pedder*, and *Wyatt v. Lord Hertford*, I think that the defendant in this case is not discharged; the plaintiff never elected to take a bill, having it in his power to obtain payment in cash. The accommodation to be obtained by the bill was an acceleration of payment, not a prolongation of credit for the demand.

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LITLEDAL J. Upon the authority of the decided cases on this subject, I think that there is not enough in this bill transaction to discharge the defendant, who was neither misled nor prejudiced by it.

PARKE J. I am of the same opinion. It is clear that the debt was originally due from the defendant to the plaintiff. The defendant, therefore, was bound to make out in evidence such an answer as could have been pleaded. Could the transaction in question have been pleaded as payment? Clearly not, for unless a bill is taken by choice instead of cash, it is not equivalent to payment. Then could it be pleaded as accord and satisfaction; are there facts enough to shew that the plaintiff consented to discharge the defendant? There may be some evidence of that, but not sufficient to warrant our drawing such a conclusion. In *Reed v. White* the question was left to the jury; and from the nature of the report it seems probable that there were other

(a) Tried before Lord Kenyon C. J. in 1796.

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facts not particularly noticed, which might have established something equivalent to payment. Here there is nothing but the naked fact of taking the bill, and that I think is no legal answer to the plaintiff's demand.

Postea to the plaintiff.

Thursday,
May 21st.

The KING against The PADDINGTON Vestry.

By a local act for better governing and regulating the parish of *Paddington*, it was enacted, that no road which had not been repaired by the parish should be repaired out of the parochial funds, until such road should have been surveyed by two surveyors, and certified by them to have been properly formed, constructed, made, and drained, one of the surveyors to be appointed by the vestry, and one by the freeholder or his lessee. A road had been set out by the proprietors for the purpose of letting the frontage of 5660 feet as building ground. Eight houses had been built, and were inhabited, and twenty-six carcasses erected. The road had been formed, constructed, made, and drained, and used by the public for six months; and the freeholder and his lessee had appointed a surveyor, and required the vestry to appoint one, which they refused to do. The Court, in the exercise of its discretion, refused to grant a mandamus to the vestry to compel them to appoint a surveyor, inasmuch as such appointment would have the effect of throwing on the parish the burden of repairing a road which would be not so much for the benefit of the public, as for the peculiar benefit of the freeholder during the time his buildings were erecting.

A RULE nisi had been obtained for a mandamus, directed to the Lord Bishop of *London* and others, being the vestry of *Paddington*, commanding them to choose a surveyor, to survey on their part *Grand Junction Street* in that parish (pursuant to the directions of a local act, 5 G. 4. c. 126.) jointly with G. G. the surveyor appointed by the freeholder and his lessees. That act, which was intituled "an act for better governing and regulating the parish of *Paddington*, in the county of *Middlesex*, &c. for paving, lighting, and watching such parts of the said parish as may be necessary, and for other purposes relating to those objects," enacts, by section 62., "that no road or highway within the said parish, which has not previous to the passing of this act been repaired as a public highway, and dedicated to the use of the public by all persons interested therein, shall be taken as a parish road by the said vestry, to be repaired and to be kept

in

in repair out of the parochial funds applicable to the highways, until such road or highway shall have been first surveyed by two surveyors, and certified by writing under the hands of such surveyors, that such road or highway has been properly formed, constructed, made, and drained, with all fit and necessary materials; one of the said surveyors to be chosen by the said vestry, and one by the freeholder, or his or her immediate lessee or lessees, or the assignee or assignees of such lessee or lessees of the land where such roads or highways are made." The affidavits in support of the rule set forth the following facts. In the year 1826, a road or street, called *Grand Junction Street*, leading from the *Edgeware* road to *Usbridge* road, was set out and formed, and in the beginning of *November* 1828 had been dedicated to the use of the public by the persons legally interested in the soil. The road had been properly framed, constructed, made, and drained, with all fit and necessary materials, and had become a great thoroughfare, and convenient and useful to the public, and had, ever since the month of *November* 1828, been constantly used by the public as a thoroughfare. The freeholder and his lessees had appointed a surveyor, and the parish had been required to appoint another on their part, but had refused so to do. The affidavits in answer stated, that the street in question had been laid out by the proprietors for the purpose of letting the north and south frontage thereof as building ground; that the street contained a frontage of 5660 feet, exclusive of 544 feet intended as cross streets; that there were only eight houses inhabited, and twenty-six carcasses erected; that the carting of materials for erecting buildings would cut up and damage the road, so that great labour and expense would be necessary to keep it

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in repair during the time the buildings were erecting. The expense was estimated at 400*l.* per annum, and the rates payable in respect of the eight inhabited houses would not exceed 8*l.*

Sir J. Scarlett, Gurney, and Platt on a former day in this term shewed cause. The sixty-second section of the act does not make it imperative on the parish to appoint a surveyor, but leaves it to their option to do so or not. The object of the clause was to prevent the burden of repairing a road being thrown on the parish by mere user of the public; and it therefore provides, "that no road shall be taken to be a parish road repairable out of the parish funds, until such road shall have been certified by two surveyors to have been properly formed, constructed, made, and drained, with all fit and necessary materials, one of such surveyors to be chosen by the parish." The argument is, that that clause by implication binds the parish to do an act which, when done, will undoubtedly make them liable to bear that burden. The road in this case was made by persons who have entered into a building speculation, and they are seeking for their own private advantage to have the road repaired at the expense of the public. *Rex v. St. Benedict* (a) shews, that in order to throw on a parish the burden of repairing a road, there must not only be a dedication of the surface of the soil to the public use, but that there must be an adoption of the road by the parish. The dedication is evidence only that the owner of the soil has consented that the public may use the surface of the soil as a road. But to make the parish

(a) 4 B. & A. 447.

liable,

liable, they must by some unequivocal act adopt the road so dedicated to the public. Here, there has been no adoption by the parish.

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The *Solicitor General*, *Alderson*, and *Brodrick*, contra. Where a road has been dedicated by the owner of the soil, and has been used by the public, it becomes a highway, repairable, upon general principles, at the expense of the public, who are benefited by its use; and by the common law of *England*, by that portion of the public who inhabit the particular district, viz., a parish. The only question in this case is, Whether the road has become a highway? If it has, the parish is bound to repair it at common law, and the act of parliament has not relieved them from that obligation. The facts stated in the affidavits shew that there has been a dedication by the owner of the soil, and a user by the public. But if that be doubtful, the Court may order an issue to try whether it has become a public highway. An adoption of a road by the inhabitants of a parish is not necessary to make the parish liable to repair. If all the inhabitants of the kingdom (except the inhabitants of the parish in which the road is situated) had used the road, it would by such user have become a public highway, and by the common law of *England*, would, therefore, be repairable at the expense of that portion of the public who inhabit the parish. A dedication by the owner of the soil, and an adoption by the public, is all that is necessary to make a road a public highway. If the owner of the soil brought trespass against a person for passing along a road, and the latter shewed an user by the public generally, it would be no answer to shew that the inhabitants of the parish had

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not used it. The position laid down in *Rex v. St. Benedict (a)*, that an adoption of a road by the parish is necessary in order to make it a public highway, cannot therefore be supported.

Cur. adv. vult.

LORD TENTERDEN C. J. now delivered the judgment of the Court; and after stating that the question arose upon the sixty-second section of the local act of parliament, and reading the words of that section, proceeded as follows : —

Here there has been a dedication to and a user by the public, but that user has been of very short duration. It was contended that the vestry were bound by this act of parliament to appoint a surveyor, and that this Court was bound (on their refusal) to order them so to do. The sixty-second section of the act is, in its terms, not an enabling but a restraining clause. It was obviously the intention of the legislature thereby to prevent the parish from being burthened with the repair of a road, intended not merely for public benefit, but, for a time at least, for the peculiar private benefit of the persons forming it. If we were at the present time to order the vestry to appoint a surveyor, the consequence would be, that the parish would thereby be concluded, and would immediately be bound to repair the road. And inasmuch as this road has been made by the owner with a view to erect buildings on each side, several of which have been in part erected, and about eight completely finished and inhabited, and a great many more in contemplation, the effect of charging the parish with the repair of this road

(a) 4 B. & A. 447.

at the present time will be, that the parish will have to repair a road not for the benefit of the public at present, but for the private advantage of a person, so that he may have at the public expense a road to bring materials for his buildings. It can admit of no dispute, that while materials are bringing for the erection of the buildings, the road, however well formed, must sustain considerable injury. Under these circumstances, we think that, in the exercise of our discretion, we ought not at present to order the vestry to appoint a surveyor. What may be fit to be done when circumstances may change, may be a question hereafter for the consideration of the Court. That the Court has the power of considering whether justice be best advanced by directing a mandamus to issue, or by forbearing to do so, has been settled by several cases. It was laid down by Mr. Justice *Ashhurst* in *The King v. The Commissioners of Excise (a)*, that such an application is an application to the discretion of the Court. The same rule was acted upon in *The King v. The Justices of Lancashire (b)*; and in *The King v. The Justices of Buckinghamshire (c)*. We are of opinion that, under the particular circumstances of this case, justice will be best administered by forbearing at present to issue this writ.

Rule discharged.

(a) 2 T. R. 385.

(b) 12 East, 336.

(c) 1 B. & C. 489.

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ton Vestry.

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Friday,
May 22d.

C. GREVILLE *against* ATTKINS and Another,
Executor and Executrix of S. KEENE,
deceased.

Where a bond, after reciting that *A. B.* was colonial secretary of *Tobago*, and had appointed *C. D.* to be his deputy, to execute the office and receive the fees, in consideration of his paying thereout to *A. B.* the annual sum of 450*l.* by equal half yearly payments, was conditioned for the punctual payment of that sum (without saying "out of the fees"), and defendant pleaded, that the bond was given in pursuance of an agreement to pay that sum at all events; upon which issue was taken, and found for the defendant: Held, that even supposing the agreement to be inconsistent with the language of the bond, it was

DEBT on bond, executed by the testator on the 4th day of *January* 1822, in the penal sum of 2000*l.*, subject to a certain condition, whereby (after reciting that the said *C. Greville* was colonial secretary of the island of *Tobago*, in the *West Indies*; and that the said *C. Greville* had appointed one *T. B. Manning* to be his deputy to execute the duties of the said office in the said island of *Tobago*, and to receive the fees and emoluments thereto belonging in consideration of his the said *T. B. Manning's* paying and allowing thereout unto the said *C. Greville* the annual sum of 450*l.*, to be paid in manner thereafter mentioned; and that one *A. Manning* and the said *S. Keene* had agreed to become the sureties of the said *T. B. Manning*, for the due and punctual payment thereof,) it was declared that the condition of the said obligation was such, that if the said *T. B. Manning*, and the said *A. Manning* and *S. Keene* as such sureties as aforesaid, or any of them, their or any of their heirs, executors, or administrators did and should from thenceforth yearly and every year during so long time as the said *T. B. Manning* should hold the appointment of deputy colonial secretary of the said island of *Tobago*, in the *West Indies*, under the said *C. Greville*, and until the death, retirement, or dismissal

competent to the defendant to plead and prove it, in order to shew that the bond was given upon an illegal consideration; and that the fact found by the jury shewed that the bond was illegal, and void by virtue of the stat. 49 G. 3. c. 126.

of

of the said *T. B. Manning*, well and truly pay or cause to be paid unto the said *C. Greville*, his executors, administrators, and assigns, the annual sum of 450*l.* of lawful money of *Great Britain*, by even and equal half yearly payments in the year; that is to say, on the 1st day of *February* and the 1st day of *August* in each and every year; the first payment thereof to begin and be made on the 1st day of *August* then next ensuing; together with a proportionate part of the said annual sum of 450*l.* as should accrue due between the last half yearly payment next preceding the death of the said *T. B. Manning*, or his retirement or dismissal from the said office, and the time of his death, retirement, or dismissal as aforesaid, without any deduction or abatement for or by reason of any taxes, or other matter, cause, or thing whatsoever; or if the said *A. Manning* and *S. Keene* should give to the said *C. Greville* six months notice in writing of their intention to withdraw their security and liability to pay the said annual sum of 450*l.* in manner aforesaid; and should pay unto the said *C. Greville* all sum or sums of money that should be due to him under or by virtue of the said obligation at the expiration of such notice, then the said obligation was to be void.

The defendants pleaded, firstly, that the supposed written obligation was not the testator's deed; secondly, that the office of colonial secretary of the island of *Tobago* in the condition mentioned, was, at the respective times of the supposed bargain and sale hereinafter next mentioned, and of the execution by the testator of the writing obligatory, an office in the gift of the crown, and the island of *Tobago*, in the *West Indies*, one of his majesty's

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majesty's colonies there. That before the making of the writing obligatory, it was corruptly, and against the form of the statute in that case made and provided, agreed by and between the said *C. Greville* and the said *T. B. Manning*, *A. Manning*, *S. Keene*, that *C. Greville*, being such colonial secretary of the said island of *Tobago*, should appoint *T. B. Manning* to be his deputy to execute the duties of that office, and to receive the fees and emoluments thereto belonging, on condition of *T. B. Manning* paying and allowing thereout unto *C. Greville* yearly and every year during so long time as he *T. B. Manning* should hold the said appointment under *C. Greville*, the sum of 450*l.* of lawful money of *Great Britain*, by even and equal half-yearly payments in the year, the first payment thereof to begin and be made on the 1st day of *August* then next ensuing; together with a proportionate part of the said sum of 450*l.* as should accrue due between the last half-yearly payment next preceding the death of *T. B. Manning*, or his retirement or dismissal from the said office, and the time of his death, retirement, or dismissal, without any deduction or abatement for or by reason of any taxes or other matter, cause, or thing whatsoever; and that such payments should be secured by the joint and several bond of *T. B. Manning*, and of *A. Manning* and *S. Keene*, as sureties of *T. B. Manning*, for the due and punctual payment thereof; and that afterwards, in pursuance of the said supposed agreement of bargain and sale, *S. Keene*, as surety for *T. B. Manning*, executed the writing obligatory.

Thirdly, the same matter, except that instead of stating the appointment of *T. B. Manning* to have been agreed.

agreed to be made on condition of the future annual payment and allowance, *out of the fees and emoluments of the said office* of colonial secretary, of the said sum of 450*l.*, they alleged it to have been agreed to be made on condition of the annual payment of that sum by the said *C. Greville*.

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Fourthly, that the said office of colonial secretary of the island of *Tobago* before and at the time of the supposed corrupt agreement, bargain, and sale hereinafter next mentioned, and at the time of executing the said bond, was an office in the gift of the crown, and that before the making of the bond *C. Greville*, being such colonial secretary as aforesaid, did corruptly, and against the form of the statute, bargain and sell to *T. B. Manning* the deputation of his office of colonial secretary, and the fees and emoluments thereto belonging, on condition of *T. B. Manning* paying to *C. Greville* yearly, and every year, during so long time as he *T. B. Manning* should hold the said last-mentioned office under *C. Greville*, the sum of 450*l.*, without any deduction or abatement whatsoever; and that afterwards the testator, in pursuance of the last-mentioned supposed corrupt bargain and sale, and as surety for the due payment by *T. B. Manning* of the sum of 450*l.* in the manner last aforesaid, executed the bond.

Fifthly, that the office of colonial secretary before and at the time of the supposed corrupt agreement, bargain, and sale hereinafter next mentioned, and at the time of making the bond, was an office touching and concerning the execution of justice in the island of *Tobago*, and then alleged, as in the fourth plea, the supposed corrupt bargain and sale of the deputation of the said

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said office of colonial secretary, and the fees and emoluments thereto belonging, and that the testator executed the bond in pursuance thereof.

Sixthly, that the office of colonial secretary before and at the time of the supposed corrupt agreement, bargain and sale hereinafter next mentioned, and at the time of making the bond, was an office touching and concerning the clerkship of the Court of Common Pleas in the said island of *Tobago*, and occupied there in the said Court of Common Pleas, being a court of record wherein justice was administered in the island, and then again alleged, as in the fourth plea, a supposed corrupt bargain and sale of the deputation of the office of colonial secretary, and the fees and emoluments thereto belonging, and that the testator executed the bond in pursuance thereof, and

Seventhly and eighthly, that the writing obligatory was obtained by fraud, covin, and misrepresentation.

The plaintiff, in his replication, joined issue upon the first plea, and denied as well the alleged corrupt agreements in the second, third, fourth, fifth, and sixth pleas respectively mentioned, as the alleged covin and fraud in the seventh and last pleas mentioned, and suggested breaches under the statute, upon which denials the defendant also joined issue. At the trial the jury found for the plaintiff on the first, seventh, and last issues, and upon the remaining issues also a verdict was taken for the plaintiff, subject to the opinion of the Court upon the following case: —

The plaintiff being colonial secretary of the island of *Tobago*, under letters patent heretofore granted by the crown under the seal of the island, whereby he had
been

been constituted and appointed such secretary, to hold and exercise the said office by himself or his sufficient deputy, shortly before the execution of the above-mentioned bond, agreed with *T. B. Manning, A. Manning, and S. Keene*, to appoint the said *T. B. Manning* his deputy to execute the duties of the said office of colonial secretary, and to allow him to receive the fees and emoluments thereto belonging, on condition of the said *T. B. Manning* paying *at all events* to the plaintiff the sum of 450*l.* yearly during the period, by the payments and at the times in the condition of the bond respectively mentioned. In pursuance of this agreement, the bond in question was executed by the defendants' testator as one of the sureties of *T. B. Manning*, who was appointed deputy, and continued in the enjoyment of the office of deputy colonial secretary, and in receipt of the said fees and emoluments, from the 15th *April* in the year of our Lord 1822, till 15th of *September* in the year of our Lord 1823, when he was dismissed from his said office.

The jury found that the sum of 450*l.* a year was to be paid absolutely, whether the fees were more or less, and that the fees of the office did, after deducting the expenses, exceed the sum of 450*l.* annually.

Platt for the plaintiff. The principal statute against the sale of offices and deputations, is the 5 & 6 *Ed. 6. c. 16. (a)* The rule and the reasons of it, by which it is to

(a) By which it was enacted, " That if any person or persons at any time hereafter bargain or sell any office or offices, or deputation of any office or offices, or any part or parcel of any of them, or receive, have, or take any promise, agreement, covenant, bond, or any assurance to receive or have any money, fee, reward, or other profit, directly or indirectly, for any

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to be ascertained whether a bargain is within that statute, are very clearly laid down in *Godolphin v. Tudor* (a). There the Court held, "That where an office is within the statute and the salary is certain, if the principal make deputation, reserving a lesser sum out of the salary, it is good. So if the profits be uncertain arising from fees, if the principal make a deputation reserving a sum certain out of the fees and profits of the office (which was done in the case now before the Court), it is good, for in these cases the deputy is not to pay unless the profits arise to so much, &c. But where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events, and such bond is void by the statute." And the same rule was recognised in *Culliford v. De Cardonell* (b). Although the statute 5 & 6 Ed. 6. does not extend to the colonies, *Blankard v. Galdy* (c), yet the 49 G. 3. c. 126., which does extend to them, must receive a similar construction, and then it will appear that the present case is not affected by it. The condition of the bond recites an agreement to pay the plaintiff the fixed annual sum *out of the fees of the office*.

any office or offices, or for the deputation of any office or offices, or any part of any of them; or to the intent that any person should have, exercise, or enjoy any office or offices, or the deputation of any office or offices, or any part of any of them, which office or offices, or any part or parcel of them, shall in anywise touch or concern the administration or execution of justice, or the receipt, controlment, or payment of any of the king's highness treasure, money, &c.; that then, all and every such person and persons shall lose and forfeit their interest in any such office." And by s. 3. "All and every such bargains, sales, promises, bonds, agreements, covenants, and assurances, as be before specified, shall be void to and against him and them by whom any such bargain, sale, bond, promise, covenant, or assurance shall be had or made."

(a) 2 Salk. 468., affirmed in *Dom. Proc.* 1 Br. P. C. 135.

(b) 2 Salk. 166.

(c) 2 Salk. 411.

The defendants, therefore, were not liable to pay unless the fees amounted to that sum. The finding of the jury, that the money was to be paid at all events, is in contravention of the bond, and must therefore be rejected. Again, the appointment of the plaintiff to the office contemplates that he should discharge the duties by deputy, and the case, therefore, is not within the mischief intended to be obviated by the statute.

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G. R. Cross contra. The deputation to the office in question was corruptly sold by the reservation of a sum certain to be paid at all events; the contract and the bond are therefore made void by the statute 49 G. 3. c. 126. [Lord *Tenterden* C. J. The mere question appears to be, Whether the fact found is so inconsistent with the bond that it must be rejected?] There are two answers to that question. First, that taking the whole of the recital and condition together, it appears upon the face of it that the money was to be paid at all events. And, secondly, if the finding be in contravention of the bond, still it was competent to the defendants to shew by their plea and by evidence, the real nature of the transaction so as to avoid the bond, *Collins v. Blantern* (a), *Paxton v. Popham* (b). He was then stopped by the Court.

Lord *TENTERDEN* C. J. Looking at the instrument itself, there is strong ground for saying that the intent of the parties was, that the money should be paid at all events, for the payment was to be made before the amount of fees received could be known. But it was

(a) 2 *Wils.* 347.(b) 9 *East*, 408.

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certainly competent to the jury, on the authority of the cases cited, to find the fact out of which the illegality of the transaction arises. They have found it, and that fact shews the bond to be void, the defendants are therefore entitled to the judgment of the Court.

Postea to the defendants.

Friday,
May 22d.

ROTHSCHILD *against* HENNINGS.

(In Error.)

A., a loan contractor, in October 1822, delivered to *B.* certain scrip receipts, stating that *B.* had paid him ten per cent. deposit in respect of a certain quantity of Neapolitan stock, and that on payment of the balance before the 1st of February 1823, the bearer would be entitled to certifi-

ASSUMPSIT for money had and received. Plea, non assumpsit. A special verdict having been found, the Court of Common Pleas (*a*) gave judgment for the plaintiff below. A writ of error having been brought to reverse that judgment, the case was argued on a former day in this term by *F. Pollock* for the plaintiff in error, and *Comyn* for the defendant in error. The facts set out in the special verdict are stated in the judgment of the Court delivered by Lord *Tenterden* C. J. so that it becomes unnecessary to state them here. The arguments were in substance as follow:—

cates for that amount of stock. *B.* transferred the receipts to *C.* for a valuable consideration. *A.*, by advertisement, offered the holders of the receipts, upon certain conditions, an extension of time for payment of the balance due on them; requiring, also, that the receipts should be left at his office, for the purpose of being marked, as holden under the new conditions. The receipts transferred by *B.* to *C.* were by him sent to *A.*'s office, where they were indorsed by *A.* with *C.*'s name. The latter having failed to comply with the new conditions, *A.* refused to deliver the certificates or to return the deposit. *C.* claimed a return of the deposit, as being retained by *A.* without consideration: Held, that *C.* was not entitled to recover the same, because *B.* had full consideration for the deposit in the option which the scrip receipts gave him to become the proprietor of so much stock by payment of the balance of the price on the day named.

Assuming that *C.* had any right of action against *A.*, quære, if money had and received could have been maintained.

(*a*) See 4 Bing. 116. where the special verdict is set out.

F. Pollock

F. Pollock for the plaintiff in error. The Court of Common Pleas have by their judgment decided two points; first, that *Hennings*, the purchaser of the scrip receipts, is entitled to recover back the sum deposited with *Rothschild*, on the ground that the consideration in respect of which that deposit was made has entirely failed; and, secondly, that he is entitled to recover that sum in an action for money had and received. First, *Hennings* is not entitled to recover at all, because he had full consideration for the deposit in the option which the receipts gave him, to become the proprietor of so much stock by payment of the balance of the stipulated price on the day named in the contract. This very point was decided by the Vice-Chancellor in *Doloret v. Rothschild* (a). That case was not cited in the Court of Common Pleas. The money is not sought to be retained as a forfeiture, but as part of the purchase-money paid by *Hennings* for the right to have his scrip receipts converted into a certain quantity of *Neapolitan* stock, which he (*Hennings*) might have had if he had performed his part of the contract. *Hennings* has no right to rescind the contract unless he can place the parties in statu quo. But by not having complied either with the terms originally proposed, or with those afterwards substituted, he has broken the contract, and, therefore, is not entitled to recover damages for the non-performance of it, or to treat it as rescinded and recover the money originally paid.

Secondly, *Hennings*, the plaintiff below, cannot recover the deposit in an action for money had and received, but must sue for damages for the breach of contract (if any) by *Rothschild*. *Hennings* was not the

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person who paid the money to *Rothschild*. No promise was made to him so as to authorize him to sue at all, and he, on his part, has not so conducted himself as to be entitled to repudiate the contract and recover back the money paid. And *Hunt v. Silk* (a) shews, where money is paid upon a contract, the remedy is on the contract, and money had and received is not maintainable unless the parties can be placed in statu quo. Here *Rothschild* cannot be placed in statu quo.

Comyn contra. The rule of law undoubtedly is, that where money is paid upon a contract and the parties cannot be placed in statu quo, an action for money had and received cannot be maintained to recover back the deposit. But such rule does not apply to the present case, which falls within another rule of law equally clear; that where the consideration has failed, and the contract has been rescinded or been put an end to, this form of action will lie. Now it appears that *Rothschild* extended the time for payment of the instalments, and *Hennings* availed himself of this indulgence; and though time may be said to be of the essence of contracts, yet it may, like all other terms, be waived or extended. In sales of estates by auction, the time for completing the sale, though fixed at a certain day, is frequently extended by the agreement of the parties, and when so extended, the contract continues open, and cannot be put an end to until some event has happened, which shews a total failure, or until there has been an absolute refusal to perform the contract; and in no case can one party insist upon a forfeiture of the deposit unless that be stipulated in the

(a) 5 East, 449.

original contract; and if the party to whom a further payment is to be made does not avail himself of such default, but treats the contract as still open, and insists on payment being made, and in consequence the money is either paid or tendered, he cannot be permitted to treat the contract as void and keep the deposit. *Rothschild*, in the present case, insisted on *Hennings* performing the contract and paying the instalments, and threatened legal proceedings against him to enforce it, as appears by his attorney's letter set out in the special verdict; and in consequence of that threat, *Hennings* tendered the whole amount of the instalments and interest. But *Rothschild* refused to accept the same, or to give the scrip receipts, or to return the deposit. This refusal, therefore, to accept the instalments, or give the receipts, or return the deposit, was a failure on his part of the consideration, and entitled *Hennings* to consider the contract at an end. *Rothschild* sustained no damage by *Hennings's* not having paid the balance within the extended time. [*Bayley J.* Has *Rothschild* failed to do any thing he contracted for?] *Rothschild* was bound to give the scrip receipts in *February*. He extended the time without any application from *Hennings*. If *Hennings* had paid the money at the extended time, *Rothschild* would have been bound. But *Rothschild* afterwards insisted on *Hennings* completing the contract, by paying the instalments with interest and damages; he, however, then refused to give the receipts which he held. This was a failure to do that which he had guaranteed to do, and he could not in justice hold this large deposit and say, "I will consider it as forfeited," there being no term in the contract that it should be deemed forfeited in any event. [*Lord Tenterden C. J.* Can *Hennings* maintain money had and received?]

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received?] *Rothschild* having refused to complete the contract, and to give up the deposit, *Hennings* had then a right to consider the contract at an end, and to recover back the full amount of the deposit; he being the holder of the receipts and entitled to all the rights of *Lowe*, one of which was, that on failure of the consideration he should receive back the deposit. If there had been a debt due from *Rothschild* to *Lowe*, and a debt of the same amount from *Lowe* to *Hennings*, and the three had agreed that *Rothschild* should be *Hennings's* debtor, instead of *Lowe*, and *Rothschild* had promised to pay *Hennings* the amount owing to him by *Lowe*, an action for money had and received might have been maintained by *Hennings* against *Rothschild*. *Cuxon v. Chadley* (a), *Hodgson v. Andrews* (b), *Wharton v. Walker* (c). [Lord Tenterden C. J. There was not, in this case, any debt (d), existing at the time when *Rothschild* recognized *Hennings* as the holder of the receipts.]

Cur. adv. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court.

This was a writ of error brought to reverse a judgment of the Court of Common Pleas. *Hennings*, the plaintiff below, brought an action for money had and received, to which *Rothschild* pleaded the general issue; and at the trial a special verdict was found, by which it appears that a person of the name of *Lowe* paid to *Rothschild* a large sum of money, being 10 per cent., as a deposit or first payment on the purchase of a quantity of *Neapolitan* loan, for which *Rothschild* signed receipts which are set forth at length in the special verdict. The

(a) 3 B. & C. 594.

(b) 3 B. & C. 842.

(c) 4 B. & C. 163.

(d) See *Fairlie v. Denton*, 8 B. & C. 595.

present action was to recover back the money so paid. These receipts are dated the 14th of *October* 1822, and it is expressed in them, that on payment of the balance on or before the first of *February* 1823, with 4 per cent. interest thereon from the 15th of *October* 1822, the bearer would be entitled to certificates for the amount of stock therein mentioned with interest coupons from the 1st of *July* 1822. *Lowe* did not sign any writing. On the 2d of *November* 1822, he deposited the receipts with *Hennings* as security for money advanced by him on the credit of them; and on the 3d of *December* 1822, *Hennings*, on the settlement of an account with *Lowe*, took the receipts from *Lowe* in part payment of the advances, and thus became the absolute owner and bearer of them. On the 14th and 15th of *January* 1823, *Rothschild* published advertisements notifying to the holders of the deposit receipts of this loan, that they might either pay them in full on the 1st of *February*, according to agreement, or that the period might be extended at their option on condition of a further payment of 10 per cent. on the stock on the said 1st of *February*, 10 per cent on the 1st of *March*, 20 on the 15th of *April*, 10 on the 15th of *May*, and the remainder on the 15th of *July*; and further, that the persons who intended to avail themselves of the extension, were desired to leave their receipts at *Rothschild's* in order that the same might be duly marked, and other receipts prepared for delivery on the 1st of *February*. On the 21st of *January*, *Hennings* sent the receipts to *Rothschild*, with a letter expressing his wish to avail himself of the extension. *Rothschild* then caused the receipts to be marked by the name of *Hennings*, and returned them to him. On the 24th of *January*

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1823, *Rothschild* caused another advertisement to be published, notifying that further extension of the time for payment of the balances would be granted by the instalments and at the times therein mentioned, by which the balance was made payable on the 15th of *August*, and the first instalment on the 1st of *February*. On the 5th of *February* *Rothschild*, published another advertisement, expressing that many of the holders of the *Neapolitan* deposit receipts having failed to comply with the tenor of those engagements, by which they were required to pay their balances on the 1st of *February* 1823, and not having availed themselves of the terms proposed in the advertisements of the 11th and 23d of *January*, the receipts were void, the deposits forfeited, and all obligation had ceased on his part to deliver certificates at a future time, but that he would grant an indulgence of one week from that date, either to pay the balances due on the first instalment, or make the further deposits according to the former advertisements. On the 11th of *February* another advertisement was published, by which, referring to the three former advertisements, *Rothschild* informed the holders of scrip receipts that the loan, contracted for had been paid, and the stock certificates were ready for delivery, and that those who had not accepted the terms of extension were required to take notice, that unless the terms were accepted or the balances and interest thereon paid on or before the 20th of *February* instant, he should consider that the holders did not intend to complete their contracts, and would not thereafter claim the certificates and he should therefore, after the said 20th of *February*, dispose of or keep the certificates, and put the proceeds or the value of them to the credit of the holders, on account of the balance

balance and interest due, and hold them answerable to him for any loss or deficiency. On the 14th of *May* following, *Hennings* tendered to *Rothschild* the amount of the instalments with interest thereon at 5 per cent. *Rothschild* refused to accept the money, and told *Hennings* he had nothing to do with him, — that he was too late. On the 3d of *June*, *Hennings* wrote a letter to *Rothschild* again, offering the balance and interest, and saying, that if *Rothschild* should continue to refuse to deliver the stock certificates, he required an immediate return of the deposit, and would commence an action to recover it. *Rothschild*, upon receipt of this, told the bearer he must go to his lawyer. The price of the *Neapolitan* scrip began to fall on the 1st of *February* 1829, and continued to fall until the latter end of *April*. In the beginning of *May* an advance took place of about 8 per cent from its lowest price.

In the argument before us, the learned counsel for *Rothschild*, the plaintiff in error, observed that an action in this form could not be maintained by a purchaser of the receipts, but he chose to rest his client's case rather on the general question and merits than on the form of the action, and contended that *Hennings* not having complied either with the terms originally proposed, or with those that afterwards were offered, had himself broken the contract, and was not entitled either to recover damages for the non-performance of it, or to treat it as rescinded and claim a return of the money paid, *Rothschild's* engagement to deliver the certificates on the receipt of the further sums being in itself a sufficient consideration for the payment of the first sum; and he cited the case of *Doloret v. Rothschild*(a), decided

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(a) 1 Sim. & Stu. 590.

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by Sir *John Leach* when Vice-Chancellor in the year 1824. That case was not quoted in the argument in the present cause before the Court of Common Pleas. It was a bill filed by another holder of similar receipts, who had in like manner neglected to offer any payment after the first, until the month of *June* 1823, and then by his bill prayed that the defendant might be decreed either to deliver the certificates or return the deposit. His Honour observed, that time was material in a case like the present, because the value was exposed to daily variation, and although the time of payment originally proposed had been waived by *Rothschild*, the waiver was only upon condition that the payment should be made at the extended times, which had not been done; and he added, that the claim of the then plaintiff to a return of the deposit, as being retained by the defendant without consideration, could not be maintained, because the plaintiff had full consideration for the deposit, in the option which the scrip receipts gave him to become the proprietor of so much stock by payment of the balance of the price on the day named; and this was not the less a consideration, because the plaintiff did not think fit to avail himself of the option.

My Brother *Parke* having been concerned as counsel in the cause, has taken no part in our deliberations. My other learned Brothers and I agree entirely with the opinion of his Honour, and we could not express it in better terms than those which are contained in the report referred to.

The judgment of the Court below must therefore be reversed.

Judgment reversed.

1820.

CHANTER *against* The Rev. P. GLUBB and
J. BURKE, Esq.

Friday,
May 22d.

TRESPASS for seizing and impounding two cows of the plaintiff. Plea, general issue. At the trial before *Best* C. J. at the Summer assizes for the county of *Devon*, a verdict was found for the plaintiff with one shilling damages, subject to the opinion of this Court on the following case:—

Before and at the time of making the assessment hereinafter mentioned, and also before and at the time of the issuing of the warrant hereinafter mentioned, the plaintiff was the lessee for years of the tithes of the parish of *Hartland*, in the county of *Devon*, under a grant of them by deed from the impropiators thereof. Under this lease he did not take them in kind, nor did he demise or grant them to the respective occupiers of the lands from which they accrued, or to any other person or persons by any deed or deeds, but he compounded for them with the respective occupiers by several parol agreements, under which they retained the tithes accruing on their respective lands to their own use, with the remaining nine parts, from which no severance in fact took place. These parol agreements enured from year to year, and were considered and treated by the parties as determinable only by six months' notice. Under them the tithes were not bargained and sold when at maturity, but the agreements were prospective, and had no reference either to any specific mode of cultivating the lands, or to the amount

A., being lessee of tithes, compounded for them with the respective occupiers by parol agreements, under which they retained the tithes accruing on their respective lands to their own use, with the remaining nine parts, from which no severance took place. The tithes were not bargained and sold when at maturity, but the agreements were prospective, and had no reference either to any specific mode of cultivating the lands, or to the amount of produce in any particular year. The composition-money was paid half yearly: Held, that the lessee was an occupier of tithes within the meaning of those words in the highway acts, and liable to be rated as such.

of

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of produce in any particular year. The composition monies in respect of the tithes so retained, were by the agreements payable half yearly. The assessment above alluded to was a composition in money in lieu of the statute duty in kind duly assessed upon the occupiers of lands, tenements, woods, tithes, and hereditaments within the said parish, for the amendment and preservation of the public highways in the same parish; and the plaintiff was therein charged in the sum of 11*l.* 17*s.* as his share and proportion of the said composition in respect of his occupation of the tithes above mentioned. The payment of the said assessment, the amount of which was not in dispute, was duly demanded and refused. The defendants were at the time of the conviction hereinafter mentioned and the issuing of the warrant, justices of the peace for the county of *Devon*. Upon the complaint of the surveyors of the parish, the plaintiff was, after due summons, hearing, and proof, convicted of the non-payment, and after order and refusal to pay the same, the warrant under which the seizure was made, was duly issued, and the seizure took place. The action was brought after a month's notice, and within the proper time for that purpose. The question for the opinion of the Court was, whether under the circumstances the plaintiff was liable to the payment of the first mentioned composition, as an occupier of tithes within the said parish.

Coleridge for the plaintiff. The question is, whether the plaintiff is an occupier of tithes within the meaning of the highway act 13 G. 3. c. 78., which imposes statute duty upon the inhabitants and occupiers of lands, tenements, woods, tithes, and hereditaments. There can
be

be no primary or immediate occupancy of tithe, for it is not in its own nature capable of occupancy more than a rent or common is, and is in truth in its nature but a rent, it cannot pass by itself but by deed and as other things which lie in grant, *Holder v. Smallbrook* (a). The question is not as to the title, but the fact of occupation. It cannot be necessary in order to fix the rate, to scrutinize the title of the holder. Visible occupation must be the rule to decide by. The question is, who has the corporeal tenth, or the incorporeal right to take it. The plaintiff has neither. He has money in lieu of them, which he will equally receive, whether there be in fact any titheable matter or not. Suppose in any year during which the composition for sheaf tithe is on foot, that the compounding land-owner for any reason should raise no corn; there will then be no titheable matter, yet the lessee will receive all that he receives now; will he then be an occupier of tithes, when no tithes in fact exist? [Lord Tenterden C. J. The case of *The King v. The Inhabitants of Lambeth* (b) shews that the parson, though he agrees that the tenant shall retain the tithes, is an occupier of the tithes within the 43 *Eliz. c. 2*. If there be no distinction between those words as used in the 43 *Eliz.* and in the highway acts, that authority is decisive against you.] The words there used in the 43 *Eliz.* are, "by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate, propriations of tithes, coal-mines," &c. In *Rex v. The Justices of Buckinghamshire* (c), the question was raised, whether a person who lets his tithes from year to year to the occupiers of the lands

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(a) *Vaugh.* 191.(b) 1 *Str.* 525.(c) 1 *B. & C.* 488.

respect-

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respectively, whereon they are produced, was liable to be rated to the repair of the highways, and *The Queen v. Bartlett* (a) was cited, but the Court intimated that it was a question admitting of doubt, and Lord Tenterden C. J. observed, that the 43 *Elix. c. 2.* went much further than the highway acts; and in *Rex v. Lacy* (b) Bayley J. observed, that the language of the 13 *G. 3. c. 78.* was very different from that used in the 43 *Elix.*; that the last mentioned statute made all local visible property liable to be rated, and parsons and vicars were rateable under it *eo nomine*. The party in *Rex v. Lambeth* (c) was to be made liable as an inhabitant having ability, and the Court therefore looked to see where the profits were. That case cannot be supported on the principle contended for by the defendant, for, according to one report of it, the lessees, who were held chargeable, held the tithes only by a verbal agreement, (8 *Mod.* 61.), and the reason assigned for the decision is, that they underlet at 6*d.* per acre profit. [Lord Tenterden C. J. That must be a mistake.] The case, however, may be supported on the principle that under the 43 *Elix.* the lessees were rateable, as inhabitants receiving profits, according to their ability. But it is so variously reported, that it is not entitled to great weight (d). *Rex v. Turner* (e) and *Rex v. Skingle* (g) are cases of poor rate.

Manning contra. *The Queen v. Bartlett* shews that the tenants of the land in this case are not the occupiers

(a) *Vin. Abr. Poor Rate* (F), pl. 4.

(b) 5 *B. & C.* 702.

(c) 1 *Str.* 525.

(d) 1 *Str.* 525. 8 *Mod.* 61. 11 *Mod.* 375. *Fortescue*, 318. *Vin. Abr. Poor* (F), pl. 7.

(e) 1 *Str.* 77.

(g) 1 *Str.* 100.

of the tithes, but that the person who by law is entitled to receive them is. It was there held that a parson who lets his tithes to the parishioners may be taxed to the poor rate, for the letting is but an agreement with the parishioners to retain the tithes, though it was objected that the parishioners were occupiers, and so the parson not rateable. Here the lessee stands in lieu of the parson. [He was then stopped by the Court.]

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GLUE.

LORD TENTERDEN C. J. In strictness of language there cannot be an occupier of tithe, tithe in its nature not being the subject matter of occupation. Giving, however, a reasonable construction to these words as used in the highway acts, we must understand the occupier of tithes to be the person who receives the tenth part of the produce of the land. Here the plaintiff was that person, and was, therefore, properly assessed for the repair of the highway. The judgment of the Court must be for the defendant.

BAYLEY J. It is very desirable that in questions of this description there should be certainty, and that nice distinctions should not prevail. Here the money payment is the substitute for the tithe. Where the owner of the tithe grants out and conveys any of the tithe to another, that other is the occupier. Where the right continues in himself, he is the occupier. The plaintiff was therefore the occupier in the present instance.

LITLEDALE and PARKE Js. concurred.

Judgment for the defendant.

- *In Casley. a. Shaw* 2 C. 2nd. 327
 - *In re Tuley & Apperley* 3rd. 18. 265
 - *Dag. v. Bonham* S. B. 219
 - *Wynn v. Edwards* 12 M. & W. 768

1829.

GEORGE PEARSE *against* JOHN PEARSE the Younger, and ELIZABETH MARGARET his Wife.

By an order of nisi prius, an action at law, and all matters in difference between the parties at law and in equity, including a chancery suit, were referred to an arbitrator, who by his award ordered that a sum of money should be paid to the plaintiff in the action, and that the bill in Chancery should be dismissed, and that all proceedings therein should utterly cease and determine: Held, that the suit in equity, and all matters in difference in that suit, and all matters in difference between the parties, were thereby finally determined, although one of the matters in dispute in the chancery suit was brought before the arbitrator as a matter in difference between the parties, and was not otherwise disposed of than by the ending of the chancery suit.

BY an order of nisi prius, this cause, and all matters in difference between the parties to the rule; or any or either of them at law and in equity, including the Chancery suit, wherein the defendants were plaintiffs, and the plaintiff and Admiral *Thomas Pearse* (who thereby consented to become a party to the rule) were defendants, were referred to the arbitrament of a barrister, who awarded that *Thomas Pearse* should, at a time and place therein mentioned, pay to *John Pearse* the younger, and *Elizabeth Margaret*, his wife, the sum of 2000*l.*, due to them for principal money secured to *E. M. Pearse* before her marriage, by a mortgage therein described, and that on payment of that sum and interest, *J. Pearse* should deliver to *Thomas Pearse* a release of the mortgage, and of the interest of him *J. Pearse* and *E. M. Pearse*, his wife, in the mortgage; and he further awarded, that at the time of the commencement of the action, there was due from *J. Pearse* and *E. M. Pearse*, his wife, to *George Pearse* 203*l.* 1*s.* 10*d.*; and the arbitrator further ordered, that the verdict entered for the plaintiff *George Pearse*, should be reduced to the said sum of 203*l.* 1*s.* 10*d.*, but that *Thomas Pearse* and *George Pearse* might deduct the sum of 203*l.* 1*s.* 10*d.*, and the costs of the action, out of the sum of 2000*l.*, and that in such case, the payment of the balance to *John Pearse* should be equivalent to and considered as the payment of the said 2000*l.*,

2000*l.*, and interest, by *Thomas Pearse*, and of the 20*9l.* 1*s.* 10., and costs, by *J. Pearse*. The arbitrator then further ordered, that *J. Pearse* should forthwith cause the bill filed by him and his wife against *Thomas Pearse* and *George Pearse*, in the Court of Chancery, to be dismissed, and that all proceedings therein should utterly cease; and that the costs of the Chancery suit, and of the reference, should be borne by the parties by whom the same had been respectively incurred; and that the costs of the award should be paid by *Thomas Pearse* and *J. Pearse*. It appeared by the affidavits, that *E. M. Pearse*, one of the children of *Thomas Pearse*, in the year 1819 (then being an infant) became entitled, under the will of *Jane Sainthill*, to a contingent share in certain stocks and monies, in the event of her attaining the age of twenty-one years; that after she attained that age, she settled an account with the trustees and executors of the will of *Jane Sainthill* in respect of that share, and that she was then entitled to 2558*l.*; that *Thomas Pearse* received such sum on her account; that in 1826, the defendants *J. Pearse* and *E. M. Pearse* intermarried, and that they applied to *Thomas Pearse* for an account of the principal sum and interest. In answer to this, *Thomas Pearse* stated that he had invested 2000*l.* upon real security for the benefit of *E. M. Pearse*, and that she had made a voluntary gift of 500*l.* to him *Thomas Pearse*. *J. Pearse* and *E. M. Pearse* filed a bill in the Court of Chancery against *G. Pearse* and *T. Pearse*, charging that they pretended that she had made a gift of the 500*l.*, when, in fact, she never made any such gift. The bill prayed an account, and that it might be decreed by the Court that the defendants, *J. Pearse* and *E. M. Pearse*, were entitled to the 500*l.*

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against
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T. Pearse by his answer admitted that, upon the settlement of the account, *E. M. Pearse* was entitled to 2558*l.*, but he claimed to retain 500*l.* as a gift. Before any further proceedings were had in the suit in Chancery, this cause came on for trial at the assizes for the county of *Somerset*, when it was referred upon the terms mentioned in the above order. Copies of the bill and answer were laid before the arbitrator. After the order of reference had been made, and on the 29th *September* 1828, *T. Pearse* gave notice of his intention to pay off the 2000*l.* at the end of six calendar months from the date of the notice; and at the first meeting before the arbitrator, it was agreed between the parties to the reference, and assented to by the arbitrator, that that sum should be paid by *T. Pearse* to *J. Pearse* and *E. M. Pearse*, his wife; and the only matters which remained in dispute between the parties was the sum of 500*l.*, alleged by *T. Pearse* to have been given to him by his daughter *E. M. Pearse*. *Kelly* had obtained a rule nisi for setting aside the award, on the ground that the mere dismissal of a bill in equity was not a final determination of the suit, and that the arbitrator had not finally settled all matters in difference between the parties, inasmuch as he had not made any award as to the sum of 500*l.*

Follett now shewed cause. The arbitrator, by his award, has finally determined the matters submitted to him. He has decided the action at law, by directing the defendant in that action to pay a sum of money to the plaintiffs; he has decided the suit in equity, by ordering a sum of 2000*l.* to be paid by *T. Pearse* to *J. Pearse* and *E. M. Pearse*, his wife, and by then directing that the bill should be dismissed. It may be true

true that a decree, that a bill shall be dismissed, cannot be pleaded in answer to a bill filed respecting the same subject matter; but where an arbitrator awards that a bill be dismissed, that is a final determination of that suit, because the arbitrator must be taken to have intended a substantial dismissal, and perpetual cesser of the suit, *Knight v. Burton* (a). It does not appear that there were any other matters in difference besides those included in the action at law, and the suit in Chancery. The principal question in dispute between the parties in the suit in Chancery, was investigated before the arbitrator, viz. whether the 500*l.* was a gift. That being included in the Chancery suit, and that suit having been determined by the arbitrator, his award is final as to all the matters submitted to him.

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Scarlett and *Kelly*, contra. The dismissal of a suit in equity is no bar to another suit, unless the Court determine that the plaintiff has no title to the relief prayed by his bill. A final decree, signed and enrolled, by which the plaintiff's rights have been conclusively determined, can alone be effectually pleaded in bar to another suit for the same matter, *Anonymous* (b), *Gregory v. Molesworth* (c), *Kinsey v. Kinsey* (d), *Senhouse v. Earl* (e), *Brandlyn v. Ord* (g). A suit may be dismissed at the hearing for want of the plaintiff's appearance; but such a decree cannot be pleaded in bar to another suit for the same matter, *Pickett v. Loggon* (h), *De Graves v. Lane*. (i) [Lord Tenterden C. J. The case of *Knight v. Burton* shews, that where an arbitrator

(a) 1 *Salk.* 75.(c) 3 *Atk.* 626.(e) 2 *Ves.* 450.(h) 14 *Ves.* 215.(b) 5 *Atk.* 809.(d) 2 *Ves.* 576.(g) 1 *Atk.* 571.(i) 15 *Ves.* 291.

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by his award directs a bill to be dismissed, he must be understood to have decided conclusively the right of the parties with respect to all the matters which were the subject of the suit in equity.] But assuming that the Court will intend that the arbitrator meant a final cesser and determination of the suit, and therefore that the Chancery suit is finally determined, there was in this case a submission, not only of the action at law, and of the suit in Chancery, but of all matters in difference between the parties. The award of the arbitrator can have no greater effect than the decree of a court of equity would have. Now, if there had been a decree of a court of equity that the bill should be dismissed, it would not have prevented *J. Pearse* and his wife from suing *T. Pearse* for the 500*l.* That was a distinct matter in difference between the parties. [Lord *Tenterden* C. J. It was referred as part of the suit in equity, not as a distinct matter.] The award determines the suit, but not other matters in difference.

LORD TENTERDEN C. J. There was in this case a submission of an action at law, a suit in equity, and of all matters in difference between the parties or either of them. The arbitrator has adjudicated upon the action at law, by ordering the defendants to pay the plaintiff a sum of money: he has adjudicated upon the suit in equity, by ordering the bill to be dismissed, and each party to pay his own costs. It does not appear that there was any matter in difference, between the defendants in the action and *T. Pearse*, not included in the suit in equity. The question whether the 500*l.* was a gift or a loan, was a matter included in the suit in equity. Then if there were no matters in difference between the parties, besides those included in the action at law, and the suit in

in

in equity, the arbitrator, by his award, has decided upon those matters. The award, therefore, is good, and the rule must be discharged.

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against
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Rule discharged.

GEORGE BARKER, one of the Executors of *Saturday, May 23d.*
MATTHEW BOWLES, deceased, against CHARLES
MAY and MARY his Wife, and J. DENNES and
HANNAH his Wife.

MATTHEW BOWLES by his will appointed *S.* *Bowles* and *George Barker* his executors; and he devised to them, their heirs and assigns, his lands, tenements, hereditaments, &c., upon trust to sell and dispose of the same, and directed that the money which should arise from the sale, as well as the rents and profits until the sale, should be deemed to be part of his personal estate, and that the same monies, rents, and profits should be subject to the dispositions thereafter mentioned concerning his personal estate. He then directed his personal estate to be sold, and when the money arising from the sale of his personal estate, and from the hereditaments and premises thereinbefore made saleable, and the rents and profits thereof, should have been collected, he disposed of it in the manner therein mentioned. He bequeathed several legacies, and among others one to *Mary May*, the wife of *Charles May*. The will was proved in 1815. In 1828 a citation issued against other dispositions he bequeathed a legacy to *A. B.*: Held, that the money arising from the sale of the real estate was equitable assets, and that a legatee could not maintain a suit in the ecclesiastical court to recover his legacy.

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out of the consistorial court of *Norwich*, at the suit of *C. May* and *Mary* his wife, whereby *Barker*, as one of the executors of *M. Bowles*, was cited to produce an inventory and account of the goods and chattels, &c. which had come to his possession as executor of *M. Bowles*. *Barker* accounted for all the personal estate, and admitted that he had in his hands the sum of 159*l.* 16*s.*, arising from the sale of the real estate; but contended that he was not liable to account for the same, not being part of the personal estate of *M. Bowles*. *May* and his wife then presented for admission to the judge of the court a libel, for the purpose of enforcing payment of their legacy; and the judge admitted the libel. *Hutchinson* obtained a rule nisi for a prohibition, on the ground that the ecclesiastical court could not entertain the suit, inasmuch as the devise was of real estate; and that a devise of real estate, although to the executors for sale, was a trust, and that the monies arising from the sale thereof were equitable and not legal assets.

The *Solicitor-General* now shewed cause. The testator has expressly directed that the proceeds of his real estate, when sold, should be deemed part of his personal estate. Besides, the executor, having inserted the proceeds of the real estate in his inventory, cannot now contend that they are not personalty. Here, too, the money, having been raised by the executors, is personalty. In an anonymous case in *Trin. 9 Eliz. (a)* it was held, that a prohibition will not lie to the spiritual court in a suit for a legacy to be paid out of money arising from

(a) *Dyer*, 264.

lands devised to the executors to be sold for that purpose. In *Love v. Naplesden* (a) it was held, that a legacy bequeathed out of the profits of leasehold and freehold lands might be sued for in the spiritual court, although the term expired and the devisee of the freehold died before payment, because it was a personal legacy; although to be raised out of the profits of the land; yet being raised out of the term for years, as well as out of the land, and the executors having raised it, it was reasonable there should be remedy in the ecclesiastical court. In *Netter v. Brett* (b), *Croke J.*, who differed from the rest of the Court, assented to the case in *Trin. 9 Eliz.*, for the reason that the land being sold the money was personal, and assets in the hands of the executors, so as it savours not of the realty being executed. In *Bassett v. Bassett* (c), a legacy of 800*l.*, payable at twenty-one or marriage, was charged on a mixed fund, partly real and partly personal. The legatee died before twenty-one and unmarried; assets were admitted. The Lord Chancellor refused to grant an injunction to stay proceedings by the personal representative of the legatee in the ecclesiastical court for the recovery of the legacy, as that court was a proper jurisdiction for legacies charged on personal estate.

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Hutchinson contra. The anonymous case *Trin. 9 Eliz.* is at variance with *Paschall v. Ketterich*, 4 & 5 *Ph. & M.* (d). There the testator devised that his executors should sell his land, and that his daughter should have a portion of the money; the executors

(a) *Cro. Jac.* 279.(b) *Cro. Car.* 396.(c) 3 *Atk.* 208.(d) *Dyer*, 151 b.

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made sale, and refused to pay the legacy. The daughter sued them in the ecclesiastical court, and this court granted a prohibition, because it was not a legacy testamentary, but out of land; and in a note to this case it is said, that this book is affirmed by *Coke* to be the better law, and that he shall sue in the court of the king for the money; and so it was adjudged two or three times in the course of his practice by *Coke*, and *Sambern v. Sambern* (a) is referred to. In *Edwards v. Graves* (b) there was a devise to trustees to sell land, and to dispose of the money to the defendant and three others equally. The land was sold, and the defendant sued in the spiritual court for the fourth part of the money. The Court of King's Bench held that neither the land nor the money was testamentary, for it was not assets to pay debts, but a sum arising out of land, and appointed to special uses in way of equity, and not as a legacy, and therefore was not to be sued for in the ecclesiastical court, but in a court of equity; and that court cannot hold plea of a legacy in equity but where it is a legacy in law, indeed; for they must hold plea by their law, as our courts of law do. So in *Bastard v. Stockwell* (c) it was held, that none can sue in the ecclesiastical court for a legacy arising out of land, because not within their consueance. This is consistent with 4 *Bac. Abr.* tit. *Legacy*, (M), and *Shepherd's Touchstone*, 450. In *Lewin v. Okeley* (d) Lord *Hardwicke* decided, that wherever an executor is also the trustee for payment of debts, the assets shall still be equitable, and not legal. In *Silk v. Prime* (e), all the cases were reviewed by Lord *Camden*, and he decided

(a) 2 *Buls.* 257.(b) *Hob.* 265.(c) 2 *Show.* 50.(d) 2 *Atk.* 50.(e) 1 *Bro. Cha. Cas.* 138. in notes.

that

that wherever the land is devised for payment of debts to the same persons who are executors, the assets are equitable. This decision was confirmed and acted upon by Lord Eldon in *Bailey v. Ekins* (a) and *Shiphard v. Lutwidge* (b). These authorities establish that a devise for payment of debts makes equitable assets.

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LORD TENTERDEN C. J. The rule for a prohibition must be made absolute. In some of the older cases it has been held, that where land is devised to be sold by executors, or devised to executors to be sold, the proceeds arising from the sale are legal assets. But later cases have established, that if land be devised to trustees to be sold for payment of debts; and the same persons are executors, the effect of that is to create a charge upon the land to the amount of the debts, and that when sold, the proceeds in the hands of the executors are equitable and not legal assets; and that, consequently, a legatee entitled to a proportion of such assets cannot sue for them in the Ecclesiastical court. In *Clay v. Willis* (c), there was a devise to two persons in trust, to sell and pay debts, and the same persons were appointed executors: it was held, that the money arising from the sale of the land was equitable, and not legal assets. Bayley J. there says, "The money became equitable assets for two reasons; first, because the subject-matter of the devise was equitable property at the death of the testator; and, secondly, because it was a devise to pay debts;" and then, after observing that the subject-matter of the devise being an equity of redemption was equitable assets, he says, "As to the second

(a) 7 Ves. 319.

(b) 8 Ves. 26.

(c) 1 B. & C. 364.

ground,

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ground, *Lewin v. Okeley* (a) is precisely in point; that was followed by *Silk v. Prime* (b), in which all the cases were fully considered, and *Newton v. Bennet* (c) to the same effect; and those cases have since been confirmed by Lord Chancellor Eldon in *Bailey v. Ekins* (d), and *Shiphard v. Lutwidge* (e), in which he said, that it made no difference whether the descent were broken or not; i. e. whether the land were devised to trustees to sell, or descended to the heir charged with the debts. There certainly are some old cases in which it is said, that if land be devised to trustees for payment of debts, and the same persons are made executors, the assets will be legal; but the cases which I have mentioned, and all the modern decisions, are the other way." That case is not distinguishable in principle from the present. Without that additional authority, I should have thought that the principles laid down in the cases cited furnish a plain intelligible rule, that where lands are devised to executors to be sold for the payment of debts and legacies, the money arising from the sale is to be deemed equitable, and not legal, assets. Here the executors are trustees of the money arising from the sale of the land; the money constitutes equitable, and not legal, assets. It is quite clear the testator cannot alter the legal character of the property, by directing that it shall be considered part of his personal estate. The rule for a prohibition must be made absolute.

Rule absolute.

(a) 2 Atk. 50.

(c) 1 Bro. Cha. Cas. 134.

(e) 8 Ves. 26.

(b) 1 Bro. Cha. Cas. 138, in notes.

(d) 7 Ves. 319.

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DOE dem. HARRIS and CHEESE *against* BODEN-
HAM and Another.

Monday,
May 25th.

EJECTMENT for certain lands in the township of *Stepleton*, in the parish of *Presteign*, in the county of *Hereford*. The declaration contained only a joint demise by *Harris* and *Cheese*, laid on the 2d of *February* 1825. Plea, not guilty. At the trial before *Park J.*, at the *Hereford* Spring assizes 1826, the learned judge directed that the plaintiff should be nonsuited: and upon a motion to set aside such nonsuit, made by the said plaintiff in *Easter* term 1826, this Court recommended that the several matters and facts should be stated in a special case for their opinion, as follows:—

By an act of parliament made in the year 1810, for inclosing lands in the township of *Stepleton*, in the

By a local enclosure act it was provided, that whenever the office of a commissioner should become vacant, the lord of the manor, with the major part in value of the proprietors of lands and common rights in the parish (such value to be ascertained according to their respective assessments in the last rates made for the relief of the poor in the said parish) present at a public meeting, should

elect another. And by another clause, that out of the lands to be allotted, the commissioners should allot a part, in their judgment sufficient, when sold, to defray the expenses of carrying the act into effect; and if it should prove insufficient, the deficiency should be made up by the persons interested in the lands to be enclosed, and should be paid in such proportions, and at such times, as the commissioners should direct. And by another clause it was enacted, that the commissioners should once a year lay their accounts before a justice of the peace, and get them allowed by him, and that no charge or item in such account should be binding on the parties concerned, or valid in law, unless the same should have been duly allowed by such justice; and an appeal was given against the accounts or rates to be made by the commissioners.

The office of commissioner having become vacant, a new one was elected by the lord of the manor and the major part in value of the proprietors of lands at a public meeting. No one there disputed that he had such majority, but no reference was made to the poor-rates: Held, that nevertheless the appointment was valid.

The commissioners having set apart and sold a portion of the lands to be allotted, in order to defray expenses, found that there was a deficiency, and made a rate upon the parties interested, in order to provide for that deficiency. One of those parties having refused to pay: Held, that the commissioners might bring ejectment under the twentieth section of the general enclosure act, 41 G. 3. c. 109., to recover the land allotted to him in respect of which the rate was imposed.

The commissioners, instead of laying their accounts before a justice annually, had done so only twice in fourteen years, and had not done so for several years before the rate was made; but there never was any appeal against the accounts or the rate: Held, that the commissioners had power to make such rate, notwithstanding their neglect in passing their accounts.

In Smith v. Jones & Co 1 B. & Ad. 328

parish

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parish of *Presteign*, in the county of *Hereford*, (reciting, amongst other things, that the Earl of *Oxford* was lord of the manor of *Stepleton*, and as such claimed to be interested in the soil of the lands to be inclosed; and also reciting the general enclosure act of 41 G. 3. c. 109.), it was among other things enacted, that *Edward Robson Ward*, and *John Harris*, one of the lessors of the plaintiff, should be, and they were thereby appointed commissioners for dividing, allotting, and inclosing the lands therein mentioned, and for carrying that act, and the said recited act, into execution, subject to the rules, orders, and directions therein contained, and also subject to the powers, provisoes, and regulations of the said act of 41 G. 3., except where the same were thereby varied or altered. And it was thereby further enacted, that in case the said *Edward Robson Ward*, or *John Harris*, should die, or refuse or neglect to act, or become incapacitated to act as commissioners for the purposes of the said act, then and in every such case the lord of the said manor, with the major part, in value, of the proprietors of lands and common rights in the said parish (such value to be ascertained according to their respective assessments in the then last rates made for the relief of the poor of the said parish), present at some public meeting to be holden, &c. should elect another. And it was thereby further enacted, that the said commissioners should assign, set out, and allot unto and for the lord of the said manor so much of the said common and waste lands, thereby directed to be divided and allotted, as in the judgment of the said commissioners should be equal in value to one sixteenth part of the said commons and waste lands. And it was thereby also further enacted, that the said com-

commissioners should from time to time set out and allot such part or parts and parcels of the said common and waste lands, as they should adjudge sufficient in value, when sold, to defray the necessary charges and expences attending the applying for and obtaining that act, and carrying the same and the said recited act into effect, and of surveying, measuring, planning, &c. And it was thereby further enacted, that if the money arising by the sale of such allotment or allotments as aforesaid should not be sufficient to defray all the charges and expences aforesaid, then the deficiency should be made up by the several persons interested in the said lands thereby directed to be divided and inclosed, and should be paid in such shares and proportions, and within such time, and to such person or persons, as the said commissioners should direct, nominate, and appoint. And it was thereby further enacted, that once at least every year, during the execution of that act, such year to be computed from the day of passing thereof, the said commissioners should, and they were thereby required to make a just and true statement or account of all sums of money by them received and expended, or due to them for their own trouble and expences in the execution of that act; and such statement or account when so made, together with the vouchers relating thereto, should be by them laid before some one or more of his majesty's justices of the peace for the said county of *Hereford*, to be by him or them examined and balanced; and such balance should be by such justice or justices stated in the book of accounts to be kept in the office of the clerk of the said commissioners, and no charge or item in such statement or account should be binding on the parties concerned, or valid in law,

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law, unless the same should have been duly allowed by such justice or justices. And it was thereby further enacted, that if any person or persons, body or bodies politic, corporate, or collegiate, should think himself, herself, or themselves aggrieved by any thing done in pursuance of the said recited act or that act, (other than and except such orders and determinations of the said commissioners as were by the said recited act or that act declared to be final and conclusive, and except in such cases wherein an issue at law should be tried as thereinbefore mentioned,) then and in every such case he, she, or they might appeal to the justices of the peace at the general quarter sessions.

In the month of *March 1822* the said *Edward Robson Ward* died; and on the 23d of *April 1822*, at a meeting held for the purpose of appointing a commissioner in the room of the said *Edward Robson Ward*, due notice thereof, and of the intent thereof, having been previously given as required by the said local act, the then agent of the lord of the said manor, and certain proprietors of lands and common rights in the said parish present at such meeting, by writing under their hands elected and appointed the said *John Cheese* to be a commissioner in the room and stead of the said *Edward Robson Ward*. The proprietors who attended such meeting, and signed the appointment as aforesaid, were the major part in value, being nearly five sixths in value of the then proprietors of lands and common rights in the said parish; but such value was not ascertained according to any assessment in the then last rates made for the relief of the poor in the said parish. It did not appear there was any dispute or difference as to the value of their respective lands or rights

rights of common, or that any one required the production of such assessments at the said meeting.

A considerable quantity of the lands mentioned in the local act was sold in or about the year 1811, under the powers of that act, to defray the charges and expences mentioned in the said act in that behalf; and the monies arising from such sale, together with interest upon the same, amounting in the whole to about 1200*l.*, was received by the commissioners. This sum being afterwards found insufficient to defray the whole of such charges and expences, and there being a deficiency in that respect to the amount of 838*l.*, the commissioners, on the 20th of *November* 1823, made a certain rate, directing and appointing the said deficiency to be made up by the several persons interested in the said lands by the said act directed to be divided and inclosed, in certain shares and proportions therein mentioned, and thereby directed the same to be paid into the bank of Messrs. *Coleman and Co. Leominster*, on or before the 15th day of *December* then next.

Soon after the passing of the said local act, and in the year 1819, the then commissioners duly allotted the remainder of the lands mentioned in the said act, and being about 131 acres, unto the said Earl of *Oxford*, and the several owners and persons interested therein, by virtue of their respective common rights; the allotment of the said Earl of *Oxford* being 31 A. 1 R. 30 P. The allotment of the said Earl of *Oxford* was, immediately after being allotted, taken possession of by him, and was at the time this ejectment was brought occupied and claimed under the Earl of *Oxford* by the defendants, and is the land sought to be recovered in the ejectment. The proportion and share of the rate directed

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directed thereby to be paid, in respect of the land so allotted to the said Earl of *Oxford*, is 336*l*.

Before the said 15th day of *December* notice of the rate was given to the defendants, and they, and also the Earl of *Oxford*, were then and oftentimes afterwards requested to pay the sum of 336*l*., but have refused so to do.

No account was laid by any of the commissioners before any justice of the peace of the county of *Hereford* until the 31st day of *May* 1817, when an account was laid before Mr. *Ireland*, one of his majesty's justices for that county, and was allowed by him on that day. No further account of the commissioners was laid before any justice of the peace for the county by the commissioners, or either of them, until the 12th day of *March* 1824, when several further accounts, being the accounts up to that time, were laid before Dr. *Taylor*, one of his majesty's justices of the peace for the county, and were by him allowed on that day. No appeal was ever made against the accounts, or any of them, or against the rate or assessment. The balance of the accounts allowed by Dr. *Taylor* was stated by him in the book of accounts kept in the office of the clerk to the commissioners. The defendant *Bodenham* was in possession of the land as tenant at the time the rate was made, and has continued in possession as such tenant until the present time. The defendant, *Moore*, is a trustee for the Earl of *Oxford*, and has been from the time of making the rate hitherto the landlord of *Bodenham*. Three objections were made at the trial to the plaintiff's right to recover.

1st, That the poor-rates were not referred to at the time of the election of *Cheese* to be a commissioner.

2dly,

2dly, That as the local act provided for raising money by sale of part of the lands, the twenty-ninth section (a) of the general inclosure act was applicable, and therefore ejectment not maintainable.

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 ———
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3dly, That as the accounts of the commissioners had not been audited and allowed annually according to the directions of the statute, the charges for which the rate was made could not be deemed binding on the parties concerned, or valid in law, and therefore the rate in respect of which the ejectment was brought was illegal.

These points were argued in this term by *Maule* for the lessors of the plaintiff, and *Russell* Serjt. for the defendant; but as the case is fully discussed in the judgment, the arguments have been omitted.

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord TENTERDEN C. J. This was an ejectment brought by the commissioners under an inclosure act, to recover land that had been allotted under the act of parliament to the lord of the manor, and of which the defendants were the occupiers. The commissioners had made a rate upon the persons who were the occupants of the estate, to defray the deficiency which existed after a sum of money had, on the authority of the local act, been raised by sale of a part of the place intended to

(a) By which (after reciting that it may often be provided by local acts that the expenses of carrying the same into execution shall be paid in proportion by the proprietors of lands to whom allotments shall be made) it was enacted, that where any such person refuses or neglects to pay his proportion, the commissioners may levy it by distress, or enter upon and take possession of the premises so to be allotted to such person, and receive and take the rents and profits until such person's share of the expenses shall thereby or otherwise be paid.

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be inclosed; and the defendants having refused to pay the sum imposed in respect of the lands thus allotted to them, the lessors of the plaintiff brought this ejectment under the authority of the provisions of the general inclosure act, which authorises an ejectment to be brought if the contribution imposed upon the owner of an allotment by the act of parliament is not paid at the time appointed.

Upon the argument several objections were made. One objection was, that Mr. *Cheese*, who had been appointed one of the commissioners after the passing of the act, had not been duly appointed, because at the time of his election no reference was had to the poor rate, so as to ascertain by the poor rate that he had a majority in the way required by the local act. We intimated during the argument that we thought there was no weight in that objection, inasmuch as at the time of the election all the parties were agreed, without reference to the poor rate, that the persons that voted for him were such a majority in point of value as the statute required.

Another point made was, that this was not within the operation of the twenty-ninth section of the general inclosure act. Now by that section it was enacted, that if any particular inclosure act shall provide that the expenses of the act are to be defrayed by contribution of the persons to whom allotments are made, proceedings like the present may be had in the event of any contribution called for not being duly paid. The local act in question provides that there shall be a sale in the first instance, of part of the land to be inclosed; and then it goes on to enact, that if the money raised by such sale is not sufficient, the deficiency may be raised by a contribution of the owners of the allotments. The
argument

argument was, that inasmuch as under the local act part of the money was to be raised by the sale of land, the general inclosure act could not apply to it with respect to the deficiency. We, however, intimated at the time of the argument, that in our opinion there was no weight in that objection.

The remaining objection which we took time to consider was this; that the local act requires that the commissioners shall pass their accounts before a justice of the peace annually; and it appeared that in the course of fourteen years, which was the time that had elapsed after the passing of the act, they had passed their accounts twice only. And it was contended, that until they passed their accounts before a justice, and had in that manner ascertained that a deficiency existed, they could impose no rate upon the owners of allotments, nor compel them to pay any thing to make good that deficiency. That was the point which we wished to consider. Upon looking, however, at the local act and at the general act, we are of opinion that the commissioners might by law impose a rate to raise the deficiency, without first passing their accounts. It is clear that under the general act that could be done, where the whole was to be raised by contributions from the proprietors of the respective allotments; and unless it may be done under the local act also, the consequence would be, that when all the money was exhausted which they raised by sale of the land, the proceedings must be altogether stopped until the money could be raised by a rate, which might in many cases be exceedingly inconvenient.

We think, therefore, that inasmuch as the legislature has entrusted the commissioners, under these circum-

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stances, with judging in the first instance whether there is a deficiency, and what the probable amount of that deficiency will be, we must consider the power of raising the sum by contribution among the proprietors as a power distinct and independent of that provision in the act, by which they are required to pass their accounts before a magistrate. We apprehend there might have been an appeal against the rate, if, in the judgment of those who were to pay it, that was thought sufficient ground to contend that the rate was not legal; but there has been no appeal in the present instance. It might certainly, in some views of the subject, be more convenient that the commissioners should pass their accounts before the magistrate antecedently to their estimate of the deficiency; because if they estimate the deficiency too high, and raise too much, they must in that case refund, and all the proprietors of allotments would be obliged to have a little modicum restored to them, which would be very inconvenient, and might not always be very practicable. But that is a matter rather for the consideration of the legislature than for ours. Our duty is only to look at the act and construe it, and upon consideration we think that, according to its true explanation, a rate for the deficiency might be imposed, although the commissioners had not passed their accounts; the consequence, therefore, is, that the nonsuit which took place at the trial must be set aside, and a new trial had.

Rule absolute for a new trial.

*- Connell v. Jones. 2 Q. B. 220.
- West. v. The Copper Mines Co. 7 C.B. 906*

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SAMPSON and Another *against* EASTERBY.

Tuesday,
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COVENANT. The declaration recited that Sir *C. Turner*, before and at the time of making the indenture of demise thereafter mentioned, was seised in fee of and in one undivided third part of the tenements, with the appurtenances thereafter mentioned to have been demised. And the said Sir *C. T.* being so seised, on &c. by a certain indenture of demise made between Sir *C. T.* of the one part, and *A. S., J. S., G. D.*, the defendant, *W. H.* and *F. H.* of the other part, (reciting that Sir *C. T.* did, on &c., agree with the said *A. S., &c.* to demise to them for twenty-one years, the undivided third part of Sir *C. T.* of and in the mines, minerals, and quarries thereafter described, at and under the yearly rent of, &c., and under and subject to the covenants and agreements thereafter contained; that the said *A. S., J. S., G. D.*, the defendant, *W. H.* and *F. H.* did, in pursuance of the said agreement between them and the said Sir *Charles*, enter upon and take possession of the said third part and premises on the 1st of *January* 1800; that *A. S., J. S., G. D.*, the defendant, *W. H.*, and *F. H.* had since the said 1st of *January* 1800, with the permission of Sir *C. T.* and of *W. S. Esq.*, and *C. F. F. Esq.*, the owners of the other two third

Where a lease of an undivided third part of certain mines contained a recital of an agreement made by the lessee with the lessor, and the owners of the other two thirds, for pulling down an old smelting mill, and building another of larger dimensions, and the lease contained a covenant to keep such new mill in repair, and so leave it at the expiration of the term, but did not contain a covenant to build it: Held, that such a covenant was to be implied, and that the lessor of the one third might sue upon it in respect of his interest.

The lease contained a demise of all mines and minerals then

opened or discovered, or which might during the term be opened or discovered in or under certain moors and waste lands, and also all smelting mills then standing upon the said lands, with full liberty to sink shafts there, and to build thereon any mills or other buildings requisite for working the mines; habendum the said demised premises, with the appurtenances, for twenty-one years. The lessor afterwards granted his reversion of and in the said demised premises, with the appurtenances, to *G. B.*, who by will devised the same to the plaintiffs: Held, that the covenant to build the new smelting mill tended to the support and maintenance of the thing demised, and that the assignee of the reversion might therefore sue upon it.

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parts of the said mines and premises, taken down a smelting mill belonging to them, situate upon part of a tract of waste ground within the manor of *Arkindale* thereafter mentioned, called *Old Moulds*, and some other contiguous buildings; and the said *A. S., J. S., G. D.*, the defendant, *W. H.* and *F. H.* did engage to erect, at their own expense, a smelting mill of larger dimensions, with several adjoining buildings upon another part of the said tract of waste ground; which mill, with the water wheel belonging thereto, and the said other buildings, it had been agreed should belong to and be the property of the said *Sir C. T., W. S., and C. F. F.*, in lieu of the said mill and buildings so taken down; in consideration of the rent therein reserved, and of the covenants and agreements thereafter contained, the said *Sir Charles* did demise to *A. S., J. S., G. D.*, the defendant, *W. H.* and *F. H.*, their executors, &c. all that undivided third part or share of the said *Sir Charles* of and in all and singular the mines, veins, pipes, floats, strings, and parcels of lead, tin, and copper ore, and other minerals and fossils of what nature or kind soever, which were then known, found, or discovered, or which should, during the continuance of that demise, be opened, known, found, discovered, or gotten, in, within, upon, from, or under all the moors, commons, wastes, and unclosed lands situate, lying, or being in, within, or parcel of the several manors or lordships of *Arkindale, New Forest, and Hope*, in the county of *York*, or any of them; and also of and in all mines and seams of coal, and quarries of stone, in or within the said manors or lordships, or reputed manors or lordships, or any of them, or any part thereof respectively; and also of and in all smelting mills, stamping mills, refining mills, store-houses,

Houses, work-houses, smiths' forges, sheds, hovels, and buildings standing or being in or upon any part of the said moors, commons, or wastes which then were, or at any time theretofore had been commonly used or employed for mining purposes, together with full and free liberty to *A. S., J. S., G. D.*, the defendant, *W. H.* and *F. H.*, their executors, &c. during the continuance of the demise, to dig, sink, drive, work, and make grooves, &c., and to use all other lawful ways and means whatsoever, (hushing, in any lands or grounds lying within the said manors, or any of them, and which on the day of the date of the said indenture were inclosed, only excepted unless the same should be done with the licence and consent in writing of the lords of the said manors for the time being,) for the searching for, finding, discovering, working, and getting of the lead, tin, and copper ore, and coal and all other minerals, and for working the said quarries, and burning lime in or upon all or any of the moors, commons, wastes, and uninclosed lands situated, &c.; and with full power (but so far only as Sir *Charles* could lawfully grant the same, and not otherwise,) for *A. S., J. S., G. D.*, the defendant, *W. H.* and *F. H.*, their executors, &c. to have heap room, &c. upon the said moors, commons, wastes, and uninclosed lands, for laying, placing, &c. the ores, &c. wrought and dug out of the mines and quarries, of which one third part was thereinbefore demised, and with full power (so far as, &c.) to turn and to dig watercourses, &c. to do all other things (hushing only excepted) as might be necessary; and also full power and authority to erect or build in or upon any part of the said moors, commons, wastes, and lands then uninclosed, all such smelting mills, stamping mills, &c. as might be requi-

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site for effectually working the said mines. Habendum to *A. S., J. S., G. D.*, the defendant, *J. H.* and *F. H.*, for nineteen years; and the defendant did in and by the said indenture, for himself and his heirs, &c. covenant, promise, and agree to and with the said Sir *Charles*, his heirs, &c. that the said *A. S., J. S., G. D.*, the defendant, *W. H.* and *F. H.*, their executors, administrators, and assigns, should and would during the continuance of the said demise maintain, preserve, and keep the said smelting mill engaged to be erected and built by them, with the water wheel to the same belonging, and the lobbies, ore-houses, and other houses, bingsteads, sheds, and other buildings already erected, and which during the continuance of that demise should be erected contiguous or near to the said mill, in good and sufficient condition and repair, and should, at the expiration or other sooner determination of the said term, deliver up the same in good and sufficient condition and repair; and also deliver up in good and sufficient order and repair all such forges, &c. as should within two years of the end of the term be used by the lessees for mining purposes. The declaration then stated a grant of the reversion of Sir *C. T.* of and in the said demised premises with the appurtenances to *G. B.*; that *G. B.* devised the same to the plaintiffs, and died seised of the said reversion, without altering his will. Breach, first, that neither defendant nor *A. S.*, &c. did at any time during the demise erect or build at their own expense or otherwise, a smelting mill of larger dimensions than the mill taken down, as in the indenture of demise mentioned. Secondly, that the defendant and his co-lessees did not keep such smelting mill, &c. in good repair. Thirdly, that they did not so deliver

deliver it up at the expiration of the term. Demurrer and joinder. The case was argued on a former day in this term by

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Brodrick in support of the demurrer. There are two grounds upon which the defendant is entitled to the judgment of the Court: first, the covenants which are said to have been broken, were not made with Sir *C. T.* alone, but with him and two others; secondly, these covenants did not run with the thing demised, and therefore the assignee of the reversion cannot take advantage of them. The lease does not contain any express covenant to build a smelting mill, but it will be said that a covenant may be implied from the whole of the deed, as in *Saltoun v. Houston* (a). This case is, however, different: for the covenant to keep and yield up in repair refers to the agreement to build; and that agreement was made, not with Sir *C. T.* alone, but with him and the owners of the other two thirds of the property. If, therefore, a covenant is to be implied, it must be a covenant with the three. The new mill, when erected, was to belong to the same persons as that which had been taken down, and there is no demise of the mill agreed to be erected. But, secondly, the covenant to erect the new mill was merely collateral to the thing demised, and the assignee of the reversion cannot sue upon it. The new mill was not to be erected on the same part of the waste as that which had been taken down, nor was any part of the waste demised. The distinction between covenants that run with the land and those which are collateral to it is clearly laid down in *Spencer's* case, second resolution (b). "That

(a) 1 Bing. 433.

(b) 5 Co. 17.

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if the lessee had covenanted for him and his assigns that they would make a new wall upon some part of the thing demised, forasmuch as it is to be done upon the land demised, it should bind the assignee; for although the covenant doth extend to a thing to be newly made, yet it is to be made *upon the thing demised*, and the assignee is to take the benefit of it, and therefore shall bind the assignee by express words. But although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged." Here the ground upon which the mill was to be erected was not demised to the defendant, nor conveyed to the plaintiffs' testator; he therefore could have no interest in it if erected, and consequently no benefit would accrue to him from the performance of the covenant, nor prejudice from the breach of it. The case of *Vyryan v. Arthur* (a) went beyond most cases, as to covenants running with the land; it was there held that a covenant to carry all the corn, produced on the land demised, to the mill of the lessor to be ground, was a covenant of which the assignee of the reversion of the land demised and the mill might take advantage; but the suit to the mill was likened to a rent, and the judgment of the Court proceeded on the unity of title to the mill and the land demised.

Alderson contra. Upon the first point there cannot be any doubt. Taking the whole of the deed into consideration, it is clear that the defendant agreed to erect

(a) 1 B. & C. 410.

a new mill; and although there is not any express covenant, yet a covenant is, under such circumstances, to be implied, *Holles v. Carr* (a), *Saltoun v. Houston*. As to the other point it is to be observed, that all minerals under the waste are demised with power to work for them; all smelting mills then erected are demised, and there is a covenant to build a new instead of an old mill: this amounts to a demise of that part of the waste upon which it was to be erected. At all events it was annexed or appurtenant to the thing demised. It is not correct to say that no covenants run with the land, except those which are to be performed upon the land. *Vernon v. Smith* (b), and the passage there cited by *Holroyd J.* from *Bally v. Wells* (c), are decisive of this case. Speaking of a covenant to build a house on other land, or pay a gross sum of money, he says, "The assignees, though named, are not bound, because the thing covenanted to be done has not the least reference to the thing demised; it is a substantive independent agreement, not quodam modo, but nullo modo, annexed or appurtenant to the thing leased." And again, after citing several cases, he says, "All these cases clearly prove that *inherent* covenants, and such as tend to the support and maintenance of the thing demised, where assigns are expressly mentioned, follow the reversion and the lease let them go where they will." Now this smelting mill, to be used in carrying on the mining concern, was not quodam modo, but almost omni modo appurtenant to the mines, and certainly tended to the support and maintenance of them.

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Cur. adv. vult.

(a) 2 Mod. 87.

(b) 5 B. & A. 1.

(c) *Wilmot's Notes*, 344.

Lord

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Lord TENTERDEN C. J. now delivered the judgment of the Court.

This is an action of covenant brought by the plaintiffs as devisees of Mr. *Brown*, who was the assignee of Sir *Charles Turner*, for breaches of covenant in a lease granted by Sir *Charles Turner* to the defendant and others for a term of years that has expired. The breaches assigned were, first, the not erecting a smelting house and other works connected therewith; secondly, for not maintaining these erections in good repair during the term; and, thirdly, for not leaving and delivering them up in good repair at the end of the term. The defendant demurred to the first breach separately, and jointly to the second and third.

Two questions were made: first, whether the deed did contain, according to its true construction, a covenant to erect those buildings; and, secondly, whether the covenants either to erect, or maintain and leave, were of such a nature as that the assignee of the reversion could sue upon them. (His Lordship then stated the parts of the deed set out in the declaration, and proceeded as follows:) By these parts of the deed it appears evidently to have been the intention of the parties that the building should be erected; and as no precise form of words is necessary to make a covenant, we think the recital of the agreement that the building should be erected, followed by the express covenants to maintain and leave it, do amount to a covenant in law to erect the building. For this the case of *Saltoun v. Houston* (a), which was cited for the plaintiff, is an authority directly in point. That was an action of covenant brought by the executors of *Simon*

(a) 1 *Bingh.* 433.

Frazer the elder against the executors of *Houston*, who had survived *Simon Frazer* the younger, for not paying the debts owing by the plaintiff's testator in a mercantile business which he had given up on certain terms to *Frazer* the younger and *Houston*. The deed on which the action was brought contained a recital that an account had been taken of the debts and credits of the elder *Frazer*, and the balance in his favour amounted to 38,000*l.*, and then followed these words: "And whereas it hath been agreed that the whole of the debts and credits of the elder *Frazer* should be received and paid by the younger *Frazer* and *Houston*." The deed did not contain an express covenant to pay those debts, but it contained clauses and stipulations by which it plainly appeared to be the intention of the parties that this should be done, and among others, an express covenant to pay to him the difference between the 38,000*l.* and a sum which he had consented to leave as part of the capital of the new partnership. Lord *Gifford*, in delivering his judgment, says, "The deed states, 'it has been agreed that the whole of the debts and credits of *Simon Frazer* the grandfather, shall be received and paid by *Simon Frazer* the grandson, and *James Henry Houston*;' and there is an express covenant that they shall pay to the grandfather the balance of 2033*l.* For the defendant it is contended, that this passage is a mere recital of a separate parol agreement, according to the terms of which it had been agreed the debts should be paid; and that although this supposed recital might furnish evidence in support of another action, it does not amount to any stipulation by which *Houston* rendered himself liable to the debts under the instrument now put in suit. The Court, however, must look

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look at the whole of this instrument, and if they find it contains a clear agreement to do any act, whether in the way of covenant, provision, or even exception, then it is clear that an action of covenant may be maintained on the instrument. So looking at this instrument, and considering the nature of the subject-matter, we think there is that which amounts to a covenant which has been correctly stated in the declaration, and that the plaintiffs are entitled to recover."

So in this case the erection of the building is mentioned by way of recital of an antecedent agreement, and the deed contains covenants showing that this was to be done; making, therefore, upon the whole matter, a covenant to do it.

In the present case, however, it was farther objected that the recited agreement was not with Sir *C. Turner* only, but with him and two others, and that therefore no covenant to him could be raised by implication; but as it further appears by the lease that his interest was an undivided third, and that he demises only a third, we think the recited agreement must be considered as a separate contract with him according to his interest, and may well be connected with the other parts of the deed and the express covenants before noticed, which must be construed with reference to his separate and limited interest.

For the determination of the second question, which is, whether an assignee of the reversion can sue upon these covenants, or, in the language of our books, whether they are covenants that run with the land, it will be proper to advert again to the contents of the lease. The declaration states that "Sir *C. Turner* was seised in his demesne as of fee of and in one undivided third

part

part, the whole into three equal parts to be divided, of and in the tenements with the appurtenances situate in, &c. thereafter next mentioned to have been demised." By this it appears that Sir C. Turner was seised in fee of an undivided third of the demised tenements, with the *appurtenances*, which word in its large and popular sense may well denote every thing connected with and incident or belonging to the tenements demised. The word *tenement* also, in popular as well as legal sense, is a word of very large and extensive import. Upon the perusal of so much of the lease as is set forth in the declaration, it may be inferred that Sir C. Turner, although seised of the minerals, was not seised of the moors and wastes; but nevertheless that he had power to erect on them the buildings requisite for working the mines and rendering the ore merchantable by smelting, and that such buildings belonged to him, and were his property, and removeable by him, for there is an express demise of such buildings then existing and standing on the moors and wastes used for mining purposes, with an unqualified liberty and power to erect others of the like kind, and an express covenant to leave in repair at the end of the term all such as should be used within two years of the end of the term. The building that the lessees covenanted to erect and maintain was of this kind: it was to be built for mining purposes, it was to be used for those purposes, it was to be the property of the owners of the mines; it related to the mines, and to the mines only: it could not be the property of the owners of the mines except in that character; if severed from its connexion with the mines, it would not belong to the owners. Can it then be said that these covenants concern a matter collateral to and

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unconnected with the tenements demised? If this can be said of the intended buildings, it will be equally true of the buildings previously erected on the moors; and then, if all had been withheld together with the mines, and not delivered up at the expiration of the lease, and the reversion had been assigned, the right to recover the mines would have been in one person, and the right to recover the buildings necessary for working the mines would not have been in the same person.

The rule as to the covenants that do or do not pass to or bind an assignee is laid down in *Spencer's case*, (5 *Coke*, 16 b.,) upon which all the subsequent cases are founded. It is there said, that if there be a covenant to make a new wall upon some part of the thing demised, it shall bind the assignee; and when the cases of covenants not binding the assignee are mentioned, they are said to be of things to be done that are merely collateral to the land, and that do not touch or concern the thing demised in any sort; and a covenant to build a house on other land of the lessor is mentioned only as an instance, and must therefore be understood of a house not touching or concerning the land demised. The covenants in this lease are expressed to be made to Sir C. T., his heirs or assigns. The covenant in question tends (according to the language of the Lord Chief Justice *Wilmot*, in *Bally v. Wells* (a), to the support and maintenance of the thing demised, and therefore shall pass with the reversion. This is also the language in *Shepherd's Touchstone*, p. 176. Upon the whole, therefore, the judgment of the Court must be for the plaintiffs.

Judgment for the plaintiffs.

(a) *Wilmot*, 546.

Lordy . . . Williams 3. 28. 248
Hay . . . Taylor 3. 28. 966
Heon . . . Walker 3. 28. 924
McKenna-Duck & Wigg 10. 28. 641.

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The KING *against* The Commissioners of Sewers
for the TOWER HAMLETS.

Tuesday,
May 26th.

A RULE had been obtained, calling upon the commissioners of sewers for the limits of the *Tower Hamlets*, to shew cause why a writ of certiorari should not issue, directed to them to remove into this Court a certain presentment made by a jury at a court of sewers holden within the said limits, and delivered to the said court of sewers on, &c. concerning sewers and other works within the several limits of the said district; and also a certain order for a rate made by the said commissioners on, &c. at two shillings in the pound over the whole of the said *Tower Hamlets*, founded on the said presentment, &c.

It appeared by the affidavits that the commissioners of sewers for the *Tower Hamlets*, have always acted under one commission for the whole district, and that such commission has always been in the form set out in the statute of sewers, 23 H. 8. That from the earliest period at which commissioners of sewers were granted for that district down to 1821, the commissioners had considered it to contain six different levels or lines of large leading sewers, and as to all presentments of juries which had been made to them touching the sewers in the said limits, and the rates imposed by the commissioners in pursuance of such presentments, the several juries, and also the commissioners, had acted in their proceedings, upon the acknowledged principle that there were six different levels or lines of large leading sewers

Where, in a large district, placed under one set of commissioners of sewers by the same commission, there were six separate lines of sewers, by which six several levels or divisions (into which the district was divided) were separately drained, and no one level derived benefit from the sewers in the others:

Held, that the commissioners ought to make a separate rate upon each level or division, for the maintenance of the sewers by which it was drained, and not one equal rate upon the whole district for the maintenance of all the sewers within it.

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in the said limits; and had at all times, in such presentments and rates, divided the said limits into six different levels or districts, each district being made liable to the repair of those sewers only from which it derived benefit. That separate presentments by different juries at distinct and different periods, and separate rates had always, down to 1821, been made for each of such six different levels or large leading sewers, and applicable to each of them only; and that from the earliest period down to 1821, such presentments and rates had not been made contemporaneously, but as circumstances required; and that such rates had been different and separate in amount; and that such presentments and rates had been made at different times, according as the repairs of the sewers in each level required them. In a schedule annexed to such presentments, the names of the owners or occupiers of premises in each level, to be benefited by the sewers in that level, were set forth. From the year 1821, the commissioners had taken steps towards making one equal rate over the whole of the limits of the *Tower Hamlets*; and in 1825 they impanelled a jury to make a general presentment of all the sewers indiscriminately throughout the *Tower Hamlets*, and the several inhabitants and occupiers within those limits benefited by the several sewers within those limits, and they made an equal rate for the whole. This rate was quashed for informality; and in 1828 another general presentment of the sewers throughout the *Tower Hamlets* was made, and an equal rate was made on all within those limits deriving benefit from the sewers or any of them. This was resisted by the inhabitants of the parish of *Hackney* (one of the six levels above mentioned), who had theretofore been presented and
rated

rated separately for the reparation of the sewers within their district, and which were maintained at a much smaller expense than the sewers in the other five levels, from which they derived no benefit, the principal part of the drainage in *Hackney* parish level being by means of a natural brook and some small branch sewers running into it, and which were wholly unconnected with the sewers of the other five levels. On a former day in this term

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Sir *J. Scarlett*, *Gurney*, *Curwood*, and *Chitty* shewed cause against the rule; and it was supported by

The *Solicitor General*, *Campbell*, and *Brodrick*; but the arguments have been omitted, as all the points made for and against the rate were noticed in the judgment of the Court, which was now delivered by

Lord TENTERDEN C. J. This was an application to the Court for a certiorari, to remove a rate made by the commissioners of sewers for the *Tower Hamlets*. The rule was applied for at the instance of the inhabitants of the parish of *Hackney*; and the objection made to the rate was this, namely, that the rate was imposed upon the whole district under the jurisdiction of these commissioners, the whole district of the *Tower Hamlets*, rateably and proportionably; whereas it was contended the rate ought not to be made generally upon the whole district, but that it ought to be, as until a very late period indeed it had been, so far as the books and the records of the proceedings of the commissioners go, a rate separately upon several distinct parts of this district, called or usually denominated levels. And it

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appeared by the affidavits that the parish of *Hackney*, except a very small portion, was so situate as that its drainage was into a brook which communicated with the river *Lea*, so that the drainage of that district could be carried on, and had been carried on hitherto, at a very moderate expense. The other parts of the district which lay nearer to the river *Thames*, and which were more populous, and great parts of them entirely covered with houses, were drained by means of covered sewers erected and maintained at a very great expense, and it was said it was unjust to charge the inhabitants of *Hackney*, who derive no benefit from those expensive sewers, to the maintenance of them, but that they ought to be separately rated, as they previously had been, in which case the burden on them would be much lighter; whereas the present rate had the effect of charging them with the maintenance of sewers, from which they derived no benefit. In support of the rate it was contended, not that the fact was not as alleged by the parties applying, but that by law the commissioners of sewers of this district, called the *Tower Hamlets*, could not do otherwise than make an equal pound rate upon all the lands and tenements within the district over which their commission extends.

Now it is obvious that if any such obligation did exist by law, the law would in this case, and probably in many others also, work considerable injustice. It was suggested to us at the bar, and the two cases that I shall mention were instances of it, that in many other districts the rate is not made upon the whole district, but that under the authority and jurisdiction of one commission it is divided into several parts, which are usually denominated levels, and the inhabitants of each

parti-

particular level are charged with the maintenance of the sewers within that level, which are the only sewers from which they derive benefit. If, therefore, we should hold this rate good, we should not only overturn that practice which has prevailed in this district, called the *Tower Hamlets*, for many years, up to a very recent period, but we should also be deciding in all the other cases in which separate rates are made for separate and distinct levels, that all those rates are wrong, and ought to be quashed. It appeared to us very important at least that we should be sure we did right before we came to such a decision, and we therefore took time to consider of it; and now, upon consideration and conference together, we are all of opinion that the law is not, as it was contended, in support of the rate; but that it is competent to persons acting under this commission to do that which formerly was done in this place, and still continues to be done in many other districts, namely, to subdivide their districts, and rate the inhabitants of separate parts separately, so that the inhabitants of each part may contribute to the expense of maintaining those works only by which they derive benefit. That is perfectly analogous to the principle that has always been laid down, and acted on generally. I do not speak now with reference to this particular question, which is now raised for the first time. The principle has always been laid down and acted on, that no person is to contribute to the expense except those who derive benefit from it. That general principle is very distinctly mentioned in *Roake's case* (a). The point that is now before the Court was not the point in question there; the point

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(a) 5 Co. 99.

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there was, whether the owner of particular land, a plot of seven acres, which had usually maintained a particular bank, was alone bound to repair the bank, or whether the repair should be upon the owners of a district containing about 800 acres, which was said to be within the same level, and protected by the bank, and the point decided was that it ought to be upon the occupiers of all those 800 acres that were within this level. Reference was then made to the statute of the 6 H. 6. c. 5., which is one of the old statutes of sewers, prior to the statute of 23 H. 8. c. 5.; and the language of that statute is somewhat different from the language of the 23 H. 8. c. 5., and perhaps shows more distinctly the power of the commissioners, as well as their duty, (for their powers and their duties are equivalent) to rate separately according to the maintenance of the particular works or sewers by which the parties derive benefit. The direction in the statute is, "No person shall be exempt from the rate, whatever his estate or condition may be, whether he be rich or poor, or of whatever condition, estate, or dignity he may be, who derives or receives defence, profit, or protection from the aforesaid walls, ditches, gutters, barriers, causeways," and so on. Not that all who derive benefit from the works *within the district*, but all who derive benefit from the particular things that are there mentioned, shall be chargeable to them. This case also furnishes an instance, and is one of those to which I allude, of the commissioners of a large district subdividing their rates into parts on particular levels, for the rate in *Rooke's case* was made by commissioners who had a commission to survey all walls, and so forth, in the river of *Thames*, in the counties of *Kent* and *Essex*. Now, if they had been

been bound to make one whole rate, the inhabitants of the county of *Kent*, on one side of the *Thames*, might have been charged with repairs of sewers and drains that were in *Essex*, on the other side; it is quite impossible to suppose that any thing of that kind should have taken place. There is another case which it may not be improper to mention, *Stafford v. Hamston* (a). That was a rate made by the commissioners of sewers for the city and liberty of *Westminster*, and the parish of *St. Margaret* was rated, by a separate rate, by those commissioners, being one of the parishes within their jurisdiction. The sewer toward the expense of which the plaintiff was assessed, was in the parish of *St. Margaret*; the plaintiff was an inhabitant of *Knightsbridge*, and it appeared that she derived no benefit from the sewers to which she was charged; and it was held that it was competent for her, in an action of trespass brought against the person acting under the warrant of the commissioners, to prove that fact, and that fact being proved, she was exempt from the rate, and recovered a verdict. And the case of *Netherton v. Ward* (b) supplies another instance in which the commissioners had subdivided their district. For these reasons, therefore, without going further into it, we are of opinion that the commissioners have done wrong in making the rate for the whole district, which would work the injustice I have alluded to. It is competent for them by law to rate separate parts within their jurisdiction and authority in the same manner as had been previously done. A great deal of reliance was placed in the argument on the word *level*, which is found

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(a) 2 B. & B. 691.

(b) 5 B. & A. 21.

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in the report of *Moake's* case, and in which it is said that all who be within the level are to contribute. That is very true; but the question is, what is the meaning of the word *level*? Now that word does not occur in the act of parliament, neither does it occur in the commission. If we are to attribute to the word *level* the sense sought to be attributed to it in this argument, that will make it an artificial division of the land; whereas the natural import of the word denotes, not an artificial division of the land, but the particular character and situation of it. So understood, all those cases, and all those expressions, which say that the rate is to be made equally upon all the inhabitants of the level, will stand untouched by our decision. The rule, therefore, for the certiorari must be made absolute.

Rule absolute.

Saturday,
May 30th.

The President and College or Commonalty of
the Faculty of Physic in LONDON against
HARRISON.

By statute
10 H. 8. it is
enacted, that
no person shall
practise the
faculty of phys-
ic within the
city of London,
or seven miles
thereof, unless
licensed by the
president, col-
lege, and commonalty of the faculty of physic, under the penalty of 5*l.* for every month he shall exercise the same faculty without being so licensed: Held, in an action of debt, brought to recover penalties incurred under this act, that the plaintiffs would be entitled to costs if they succeeded; because, where a right is vested in an individual or corporation, the withholding that right, and thereby compelling a party to sue for it, is an injury for which damages may be recovered, and consequently that, under the 4 Jac. 1. c. 3. the defendant having succeeded, was entitled to costs.

THE declaration stated, that whereas *Henry VIII.* by letters-patent of the 23d day of *September*, in the tenth year of his reign, did, among other things, grant to certain persons therein named, that they should be a body and commonalty, or a perpetual college, and that they might sue by the name of the president and col-

lege

lege or commonalty of the faculty of physic in *London*, and that no one should exercise the said faculty in the said city, or within seven miles round the same; unless he was admitted thereto by the president and commonalty, or their successors, by the letters of the president and college, sealed with their common seal, under the penalty of 5*l*. for every month he should exercise the same faculty without being so admitted, one moiety to be applied to the king, and the other moiety to the president and college. The declaration then stated, that the letters-patent were accepted; and that they were afterwards ratified by act of parliament; nevertheless the defendant, who is not nor at any time has been admitted by any letters of the president and college or commonalty to exercise the faculty of physic in the city of *London*, or within seven miles of the same, not regarding the statute and letters-patent nor the penalty therein contained, to wit, on the 20th *October* 1827, and for three months then next following, did exercise the faculty of physic within seven miles of the city of *London*, contrary to the letters-patent and statute, by which an action has accrued as well to our lord the now king as to the president and college or commonalty, to demand and have of the defendant the sum of 15*l*., being 5*l*. for each month during which he practised as aforesaid. Second count, that the defendant, who is not nor at any time has been admitted by any letters of the president and college or commonalty to exercise the faculty of physic in the city of *London*, or within seven miles of the same, not regarding the said statute in that case made and provided, nor the letters-patent, after the making of the statute, and before the exhibiting of this bill, to wit, on the 20th *April* 1827, and for six months

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1829. **The College of Physicians against HARRISON.** months between that day and the exhibiting of this bill, did exercise the faculty of physic within seven miles of the city of *London*, by which an action has accrued as well to our lord the king as to the president and college or commonalty, to demand and have of the defendant 30*l.*, being 5*l.* for each month during which he practised as last aforesaid. Yet the defendant, although requested, had not rendered the said sum of 45*l.* above demanded to our lord the king, and to the president and college or commonalty who sue as aforesaid, or to either of them, but to render the same to our lord the king and the said president and college or commonalty, or to either of them, hath hitherto altogether refused, and still refuses so to do. And, therefore, as well for our said lord the king as for themselves in this behalf, the said president and college or commonalty bring their suit, &c. Plea, nil debet. At the trial before Lord *Tenterden* C. J. at the *Middlesex* sittings after *Trinity* term 1827, a verdict was found for the defendant. The master, upon taxation, allowed the defendant his costs. A rule nisi had been obtained for the Master to review his taxation, upon the ground that the college of physicians, not being parties aggrieved, could not have recovered costs if they had succeeded, and, consequently, that the defendant having succeeded, was not entitled to costs.

Campbell and *Armstrong* on a former day in this term shewed cause. By the 4 *Jac.* 1. c. 3. it is enacted, that the defendant shall have costs in all actions whatsoever (wherein the plaintiff might have costs, if in case a judgment should be given for him,) if the plaintiff be nonsuited, or a verdict pass against him. If the plaintiffs, therefore, would have been entitled to costs

costs if they had succeeded, the defendant having in fact succeeded is entitled to have costs. Now here, the plaintiffs, if they had succeeded, would have been entitled to their costs, because it is a rule established by many authorities, that in any action of debt upon a statute, by a party grieved, for a certain penalty, the plaintiff shall not only recover the penalty, but also his costs of suit although costs are not expressly given, because the penalty is a debt vested in the party grieved as soon as the offence prohibited is committed, and the action is similar to that upon a bond to recover a debt already due. In that case the plaintiff is entitled to recover damages for the detention of the debt, and, consequently, costs also, by virtue of the statute of *Gloucester, North v. Wingate* (a), *Corporation of Plymouth v. Collins* (b), *The Company of Cullers in Yorkshire v. Ruslin* (c), *Ward v. Snell* (d), *Tyte v. Glode* (e); and that though the penalty be given by a statute passed subsequently to that of *Gloucester, Mayor and Commonalty of Plymouth v. Werring* (g), and a moiety belongs to the king. Here the plaintiffs were the parties grieved, because, by the defendant's having committed the act prohibited, the penalty, or a moiety of it, became a debt vested in them. The withholding of the debt was a grievance to them. The withholding of any debt after request, whether it accrue by statute or contract, constitutes an injury to the party entitled to it. The foundation of the plaintiff's claim is correctly stated in the declaration. In 6 Jac. 1. the president and college brought similar actions against Dr. *Gardiner* and Dr. *Bonham*, and had judgment for the debt, and

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(a) *Cro. Car.* 559.(b) *Carth.* 250.(c) *Skinner*, 363.(d) 1 *H. Bl.* 10.(e) 7 *T. R.* 267.(g) *Willes*, 440.

damages

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damages upon the statute, and taxed costs; and in Trinity term, 35 Car. 2. they brought a similar action against Dr. *Harden*, and recovered 25*l.* penalty, together with taxed costs. The records are set out at length in a work published in 1684, by Doctor *Goodall*, by authority of the president and college (a).

Sir *James Scarlett* and *Brougham* contra. The plaintiffs did not sue as parties grieved. The object of the crown and the legislature, by prohibiting others than members of and persons licensed by the college from practising physic in or near the metropolis, was to secure to the public the benefit of skilful practitioners. The public, and not the members of the college, are aggrieved by other persons not licensed practising physic within the limits prescribed. The president and college sue therefore as trustees for the public. It was not the intention of the legislature to give to particular individuals the exclusive right of practising physic in and near the metropolis for their own benefit, but for that of the public. Looking, therefore, at the object of the prohibition, it is clear that the penalty is given for the benefit of the public, and not of the president and

(a) The following extract from the record of the judgment in the action against Dr. *Harden* is taken from Dr. *Goodall's* book. At that time Dr. *Langton* was President of the College: — "Ideo consideratum est quod predictus *Thomas Langton*, qui tam, &c. recuperet versus prefat. *Edm.* debitum predictum unde dominus *Rex* habet unam medietatem, et predictus *Thomas Langton* qui tam, &c. et collegium predictum habeant alteram medietatem juxta formam litterarum patent predictarum et statut. predict. Quodque idem *Thomas Langton* qui tam, &c. recuperet versus predictum *Edm.* sex libras tres decim solidos et quatuor denarios pro dampnis suis que sustinuit tam occasione detentionis debiti predicti quam pro mis, et custagiis suis per ipsum circa sectam suam in hac parte apposit eidem *Thomas Langton* qui tam, &c. per cur. domini regis hic ex assensu suo adjudicat. Et predictus *Edmundus* in misericord," &c. See *Coke's Entries, Det.* 130. 164.

college;

college; and that they do not sue as parties grieved, but as trustees for the public who are the parties grieved.

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Cur. adv. vult.

LORD TENTERDEN C. J. The question in this case was, Whether or not the plaintiffs were liable to the payment of the defendant's costs? It was properly assumed, that if the plaintiffs would have been entitled to recover costs, provided they had succeeded, the defendant (having in fact succeeded), is, under the statute of *James*, entitled to be paid his costs; and we are of opinion, that in a case like this, if the plaintiffs had succeeded, they would have been entitled to costs, and, consequently, that they must pay costs. Our opinion, that the plaintiffs would have been entitled to costs if they had succeeded, is founded on this, namely, that where a right is vested in a particular person or corporation, the withholding of that right, and thereby compelling the party to sue for it, is an injury for which damages may be recovered; and if damages may be recovered, then costs will follow. That is the foundation of our opinion on the present occasion, and that opinion is warranted by several cases which have been decided on this subject. In the *Company of Cutlers in Yorkshire v. Ruslin (a)*, the action was upon a private act of parliament for a penalty in that act, for retaining an apprentice against the act; and per *Holt C. J. et totam curiam*, "Where the statute gives a penalty to the party grieved, to be recovered by action, bill, plaint, &c.; this being a duty to the party vested before action brought, he shall have costs against the defendant, because he is put by the

(a) *Skinner*, 363.

defendant

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 against
 HARRISON.

defendant to the cost and trouble of a suit; but in a tamquam or other popular action where the duty is not vested till the suit or information brought, then his interest commencing by the suit, and not being a debt vested before, he shall not have costs against the defendant." There are, also, two other cases which appear to have proceeded on the same principle, and to establish it. The first in point of date is *North v. Wingate* (a). That was error of a judgment in debt on the statute of 1 Phil. & M. c. 12. for taking ten-pence for a distress, where, by the statutes, four-pence only ought to be taken, unless in places where it is otherwise accustomed, under a penalty of 5*l*. Plea, nil debet. Verdict for 5*l*. penalty, damages two-pence, and costs 53*s*. 4*d*., and the Court increased the costs to 7*l*., and judgment was given, that the plaintiff should have writ for the 5*l*. and the damages and costs. It was objected, that no damages or costs ought to be given, because it was a penal statute, and a penalty being given by the statute, he ought not to have any costs and damages, but the penalty only. But the Court resolved, that where a statute gives a penalty certain, and an action of debt, there if the defendant does not pay it upon demand, but enforceth the party into a suit, and he recovers by action of debt, ex consequenti, he shall recover his damages, because he did not pay the duty due by the statute upon demand, and he shall also recover costs, for otherwise he should be at loss to expend more than he recovers, which the statute never intended." It is to be observed in the present case, that the penalty is given to a particular person, which distinguishes this from the case where a penalty is given to a common informer,

(a) Cro. Car. 559.

who has no right vested in him till he brings it home to the party. The other case is *The Mayor and Commonalty of Plymouth v. Werring* (a). It was debt for a penalty brought by the corporation on a private act of parliament made 27 *Eliz.* c. 20. The plaintiffs sued as well for the king as for themselves; for the penalty of 20*l.* given half to them and half to the king by that statute, and nil debet was pleaded. The plaintiffs were nonsuited at the assizes; and the question was, Whether the defendant was entitled to costs? In that case all the authorities were adverted to, and the Court decided, that where a penalty is given by a statute to a party grieved, he is entitled to costs if he succeed; and if he be nonsuited, or a verdict pass against him, he is liable to pay costs to the defendant either under the 28 *Hen.* 8. c. 15. or the 4 *Jac.* 1. c. 8., which gives costs to a defendant in all cases where the plaintiff is entitled to costs if he succeed.

The foundation of this action was, that the College of Physicians had sustained an injury, by reason of the defendants not having rendered to them a sum of money which became due to them, in consequence of the defendant's having practised physic within certain limits without having their licence. The withholding of that debt, and compelling the plaintiffs to sue for it, is an injury for which damages may be recovered, and costs follow of course; and if the plaintiffs would have been entitled to costs if they had succeeded, the defendant having succeeded, is entitled to costs. The rule must therefore be discharged.

Rule discharged.

(a) *Willes*, 440.

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Monday,
June 1st.

**JONES and Others, Assignees of LUKE SYKES
and THOMAS BURY against JOHN YATES and
JOHN YOUNG.**

PROVER for the three following bills of exchange, carried on trade in partnership, one dated the 6th of January 1825, drawn by Sykes and Bury on M^r Lathlan M^r Entyre, at sixteen months, for 472*l*. 8*s*. 9*d*., due 9th of May 1826; another dated the 1st of January 1825, drawn by Sykes and Bury on T. Ferguson, at eighteen months, for 950*l*., due the 4th of July 1826; and the other dated the 17th of January 1825, drawn by Sykes and Bury on Johnson and Wardell, at eight months, for 354*l*. 15*s*., due 20th of September 1825. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the London sittings after Hilary term 1828, the following appeared to be the facts of the case:—Previous to the month of January 1825, Sykes, one of the bankrupts, carried on business in partnership with the two defendants as Manchester warehousemen in London, under the firm of Sykes and Yates, and in Manchester under the firm of John Young and Co. The business in London was conducted by Sykes and Yates, and in Manchester by Young. Before January 1825, Sykes had proposed to dissolve the partnership existing between him, Yates, and Young, but being indebted to the firm in the sum of 2156*l*., Yates would not consent to dissolve the partnership, until that debt was discharged. On the 24th of January 1825, A. B. and C. being indebted to the firm of A. B. and C. in discharge of his private debt.

A. and D. having afterwards become bankrupt, it was held that their assignees could not maintain such actions.

Sykes,

Sykes, having on the 1st of *January* 1825 entered into partnership with *Bury*, indorsed the three bills mentioned in the declaration (being the property of *Sykes* and *Bury*) in the names of *Sykes* and *Bury*, and immediately afterwards indorsed them in the names of *Sykes* and *Yates*, to *Alredo*, in discharge of a debt for which he, with his partners *Yates* and *Young*, was jointly liable to *Alredo*, and then inclosed the bills in a letter written by himself to *Alredo*. The bills were debited in the books of *Sykes* and *Bury* to the private account of *Sykes*. *Bury* did not know (till some time afterwards) that the bills had been so indorsed by *Sykes*. *Sykes* and *Bury* stopped payment on the 30th of *July* 1825, and in *November* 1825 committed an act of bankruptcy, and were declared bankrupts under a commission issued against them.

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against
Yates

Another action was brought in assumpsit to recover sums of money drawn by *Sykes* out of the funds of *Sykes* and *Bury*, and paid into the hands of *Yates*, in further discharge of the debts due from *Sykes* to that firm. It was objected (*inter alia*) on the part of the defendant, in both actions, that *Sykes* and *Bury* could not, if they had continued solvent, have maintained any action against *Yates* and *Young*, and that the assignees of *Sykes* and *Bury* could have no other remedy than *Sykes* and *Bury* would have had. Lord *Tenterden* C. J. was inclined to think that the actions were not maintainable, but reserved the point. Verdicts were found for the plaintiffs in both actions, with liberty to the defendants to move to enter nonsuits. A rule nisi having been obtained for that purpose,

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Sir *James Scarlett, J. Evans, and Platt*, in last *Hilary* term, shewed cause. Assignees may, in many instances, maintain actions where the bankrupts could not. They may sue for and recover property voluntarily given by a bankrupt to a particular creditor in contemplation of bankruptcy, and that on the ground that such a preference is a fraud upon the bankrupt laws. So if one of several partners, with intent to defraud his copartners, were to take specific chattels belonging to them, the copartners could not bring trover, but the assignees, after demand and refusal, might. If the bills had belonged to *Sykes*, and *Sykes and Bury* had continued solvent, *Sykes* could not maintain any action. If a partner pays his private debts with a bill of exchange belonging to the partnership, and the party receiving it knows it to belong to the partnership, he cannot sue upon it. Here the plaintiffs were only bound to prove that the property was in possession of the defendants, and that there was a conversion by them, and they have proved both; because the bill was indorsed by *Sykes* to *Alzedo* with the knowledge of *Xates and Young*. An agent, acting within the scope of his authority, may bind his principal. In like manner, a partner acting within the scope of the implied authority he has to deal with the partnership property, may bind his partners. But this is a case of a partner giving a bill belonging to the partnership in payment of his own private debt; he had no authority so to do. The property in the bill, therefore, did not pass by his indorsement, but remained in him and his partners. If *Sykes and Bury*, therefore, had sued the defendants, it would not have been a defence for them to have shewn that *Sykes* had fraudulently indorsed the bills to them; and

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and though the indorsement of the bills by *Sykes* be sufficient, prima facie, to pass the property, it was open to the plaintiffs to shew that the indorsement was not effectual to pass the property. In *Bristow v. Eastman (a)*, Lord Kenyon held that one assignee of a bankrupt estate could not give a valid receipt for money due to the estate, where the express dissent of the other assignee appeared. In *Scayle v. Jackson (b)*, it was held that a receipt by one of two co-trustees was not conclusive, and that evidence was properly admitted to shew that the receipt was a fraudulent transaction, and that the money had not been paid. The property did not pass from *Sykes* by his own wrongful act, but remained in *Sykes and Bury* at the time of the act of bankruptcy. The assignees, therefore, are entitled to recover.

F. Pollock and Kelly, contra. *Yates and Young* were not parties to any fraud. *Sykes* alone was guilty of a fraud, by indorsing bills belonging to himself and others jointly, for the purpose of discharging his own private debt. That was entirely the act of *Sykes*. The act of conversion was his, for the bill was indorsed by him to *Alzedo*, to pay him a debt due from *Sykes*, *Yates*, and *Young*. *Sykes and Bury*, therefore, are suing *Yates* and *Young* for a conversion actually committed by *Sykes*, and to which *Yates* and *Young* are but constructively parties, by reason of their partnership with *Sykes*. It is certainly established by a class of cases, that where one partner uses the partnership name in fraud of the other, or makes or indorses an instrument, the innocent partner is not liable upon the instrument; but there the innocent

(a) 1 Esp. N. P. C. 174.

(b) 3 B. & C. 421.

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JAMES

YATES

YATES

YATES

PARTY is defendant, and truly alleges that he did not make the promise set forth in the declaration, whereas here the wrong done is necessarily a plaintiff, and comes into Court claiming damages for his own wrongful act. Suppose *Bury* had died then, (if this action be maintainable) the right of action must have vested in *Sykes*, and he, as sole plaintiff, would recover damages of his innocent partners *Yates* and *Young*, for a fraud which he himself had alone committed. All the authorities are against such a proposition. He clearly could not set up his own fraud, *Ather v. George* (a); even though he be jointly interested with another, *Henderson v. Wild* (b). In *Bristow v. Eastman* (c), and *Scaife v. Jackson* (d), the plaintiffs had no interest, but were mere trustees. One partnership firm cannot sue another, where any one person is a member of both, *Bosanquet v. Hargy* (e). *Mainwaring v. Newman* (g). Nor can the disability to sue be removed by omitting to include the particular defendant. In *Littleton*, s. 376, it is laid down, if two men do a trespass to another, who releases to one of them, by his deed, all actions personal, and notwithstanding sueth an action of trespass against the other, the defendant may well shew that the trespass was done by him and by another, his fellow, and that the plaintiff, by his deed (which he sheweth forth), released to his fellow all actions personal, and demand the judgment. And my Lord *Coke*, in commenting upon this, says, "If two men be jointly and severally bound in an obligation, if the obligee release to one of them, all are discharged." So in trespass against *B.*, he may plead that the trespass was committed with *A.*, and

(a) 1 Campb. 392.

(b) 2 Campb. 561.

(c) 1 Esp. N. P. C. 172.

(d) 3 B. & C. 321.

(e) 6 Taunt. 597.

(g) 3 B. & P. 120.

the plaintiff released to A, absque hoc, that it was done by him alone. *Cocke v. Jennor* (a), Com. Dig. 12. *Plac. 3* (M.) 12. Now here, although there be no release, yet Sykes, who, if a stranger were plaintiff, would be jointly liable with the two defendants, cannot be sued, because he is himself a co-plaintiff; and this is equivalent to a release at law to Sykes, which would have discharged the other defendants. So in *Hobbs v. Cammell* (b), it was held, that a member of an amicable society, entrusted with a box containing the fund, and bound by bond to keep it safely, could not maintain trover against another member, and a third person, who took it from him. It is also clear, that if Sykes and Bury could not have maintained this action, it cannot be maintained by their assignees. The right of assignees to avoid a fraudulent preference, arises from the act being a fraud upon the creditors at large, and against the policy of the bankrupt laws; but the conversion in the present case, is only a fraud by one partner upon the other, and not committed in contemplation of bankruptcy.

Lord TENTERDEN C.J. These were two actions brought by the plaintiffs as assignees of Sykes and Bury. The first was an action of trover to recover the value of three bills of exchange which belonged to Sykes and Bury, and which Sykes had indorsed to the defendants, with whom he had been in partnership, in part payment of a demand due from him to the partnership of Sykes, Yates, and Young, and by him against im-

(a) Hob. 66.

(b) 1 T. R. 658.

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Stonh
Against
Yates

mediately indorsed in the name of that partnership to ~~discharge~~ ^{discharge} who was an creditor of the firm. The second action was to recover money drawn by Sykes from the funds of himself and Bury, and paid into the hands of Yates in further discharge of the balance before mentioned, without the knowledge of Bury. Both the transactions were founded by Sykes on his partner Bury (and it must be taken that Yates at least when the bills were indorsed and the money paid) knew the bills and money came from the funds of Sykes and Bury, without the knowledge of Bury. It may be doubtful whether Young was actually privy to either transaction; but in our view of the case, that point is not material. On behalf of the defendant it was contended, that Sykes and Bury could not (if they had continued solvent) have maintained any action against Yates and Young in respect of either of these transactions; and that if that were so, the plaintiffs, their assignees, could not sue, they having no better remedy at law than Sykes and Bury would have had; and we are of this opinion. It is unnecessary, therefore, to advert to any of the other points raised in the argument at the bar. We are not aware of any instance in which a person has been allowed, as plaintiff in a court of law, to rescind his own act, on the ground that such act was a fraud on some other person; whether the party seeking to do this has sued in his own name only, or jointly with such other person. It was well observed on behalf of the defendants, that where one of two persons, who have a joint right of action, dies, the right then vests in the survivor; so that in this case (if it be held that Sykes and Bury may sue), if Bury had died before Sykes, Sykes might have sued alone, and thus for his own benefit have avoided his own act by alleging his

own

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Dowd
against
Yarral

own misconduct. The defrauded partner may perhaps have a remedy in equity by a suit in his own name, against his partner and the person with whom the fraud was committed. Such a suit is free from the inconsistency of a party suing on the ground of his own misconduct. There is a great difference between this case and that of an action brought against two or more partners on a bill of exchange fraudulently made or accepted by one partner in the name of the others, and delivered by such partner to a plaintiff in discharge of his own private debt. In the latter case, the defence is not the defence of the fraudulent party, but of the defrauded and injured party. The latter may, without any inconsistency, be permitted to say as a court of law, that although the partner may for many purposes be bound to him, yet, that he has no authority to do so by accepting a bill in the name of the firm for his own private debt. The party to a fraud, he who profits by it, shall not be allowed to create an obligation in another by his own misconduct, and make that misconduct the foundation of an action at law. Then if *Sykes* and *Bury* could not sue, how could the plaintiff, who represents them here? It was said in support of the argument, that the property did not pass from *Sykes* by his wrongfulness, but remained in *Sykes* and *Bury*. This was ingeniously and plausibly put; but as against *Sykes* the property did pass at law, and there was no remedy at law for *Bury* to recover it back again; he could not do so without making *Sykes* a party. Further, the right of the assignees to sue in this case was said to be analogous to the right of assignees to sue for and recover back property voluntarily given by a bankrupt to a particular creditor, in contemplation of his bankruptcy, in favour of such creditor,

1829,

ES.

JONES
against
YATES.

and in preference to him, in which case the bankrupt could not have sued if no commission had issued, yet the assignees are allowed to do so. That is a case where the representatives could, where the party represented could not sue, and it is the only instance of the kind mentioned at the bar, and no other has occurred to us. But if we attend to the principle on which the assignees are allowed to sue, we shall find there is no analogy between that case and the case before the Court, for the principle on which assignees have been held entitled to recover in such cases is not on the ground of fraud on any particular person, but on the ground that there has been fraud on the bankrupt laws, which are made for the purpose of effecting an equal distribution of the insolvent's estate among all the creditors, and which purpose would be defeated if a party, on the eve of a bankruptcy, and with a view to it, could distribute his effects according to his own pleasure among some favoured creditors, to the total exclusion of the others. This is mentioned by Lord Mansfield as the principle of the decisions in the early cases on the subject: *Alderson and Temple*, 4 Burrow, 2235. *Haman and Fisher*, 2172. For these reasons, we think the plaintiffs are not entitled to recover. The rule for a nonsuit must, therefore, be made absolute.

Rule absolute for a nonsuit.

1829.

**Rex against The Guardians, Churchwardens,
and Overseers of GREAT FARINGDON, in the
County of BERKS.**

TALFOURD had obtained a rule nisi for a mandamus to the guardians, churchwardens, and overseers of the poor of the parish of *Great Faringdon*, in the county of *Berks*, commanding them to allow *R. B. Gill*, an inhabitant of the parish, and liable and entitled to be rated to the rates for the relief of the poor of that parish, to inspect the books of accounts of the receipts, expenditure, and application of the rates of the said parish, and to take copies thereof and extracts therefrom at his own costs. It appeared by the affidavits in support of the rule, that *Gill* was an inhabitant of the parish liable to be rated; that the care and management of the poor of the parish, pursuant to the provisions of the 22 G. 3. c. 23., was committed to a visitor and guardians, who were appointed annually under that act, and two churchwardens and overseers; that the guardians, acting under the control of the visitor, had the entire care and management of the poor, and that the overseers merely assessed and collected the poor-rates, and paid them over to the guardians; that the accounts of the guardians, with the vouchers, were regularly produced at a meeting held the first *Monday* in every month, for the inspection and examination of the parishioners, and were so inspected and examined; that at a meeting on the 8th of *April*, such accounts for the last year were produced for the inspection of the parishioners, and having been approved of at such meeting, were verified upon

A rated parish-
ioner has a
right to inspect
the accounts of
the expenditure
of the parish
monies kept by
guardians of
the poor ap-
pointed under
22 G. 2. c. 23.
and this Court
granted a man-
damus to the
guardians, &c.
commanding to
allow such in-
spection.

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 The King
 Apprs
 Gill
 Petitioner

upon writ by *W. J. Gill*, the acting guardian, before a justice of peace, and afterwards examined and passed by the visitor of the poorhouse, who was also a justice of peace for the county; that *Gill* had applied to the guardians for leave to inspect the books, and had been refused.

Taunton now shewed cause. By the 22 G. 3. c. 83. s. 7. the guardians of the poor are invested with all the powers and authorities given to overseers of the poor by other acts of parliament. But there is no clause authorizing a parishioner to inspect the accounts. By the 17 G. 2. c. 23. s. 1. the churchwardens and overseers of the poor are required to permit any person assessed, or liable to be assessed, to inspect the books of accounts at all reasonable times, and upon demand to give copies of the same to such person. That applies to accounts of overseers appointed under the statute of the 13 Eliz. c. 2. Guardians are officers for certain purposes, but their accounts are not subject to appeal as overseers' accounts are. *Gill*, therefore, had no right of appeal, and consequently no right to inspect the books.

Sir James Scarlett and Talfourd contra. Every inhabitant rated, or liable to be rated, has an interest in seeing whether the expenditure of the parish money has been proper. Consequently he has a right to inspect the books in which the account of such expenditure is contained.

Lord TENTERDEN C. J. We have no doubt that the party is entitled to inspect the books at a reasonable time. Assuming that he has no right to appeal, or that the

the time for appeal is gone by, he may have other good reason for inspecting the books. He has a right to see what has been done. The rule, therefore, must be made absolute.

Rule absolute.

abandoner

PRICKE *against* POOLE.

CHITTY had obtained a rule nisi for discharging the defendant out of custody, on filing common bail, on the ground of a defect in the affidavit to hold to bail. It stated that *W. Poole* was indebted to him, plaintiff, in the sum of 29*l.*, and upwards, for meat, drink, washing, lodging, and other necessaries, found and provided by the plaintiff for the said *W. Poole*, and at his request, and for money paid, laid out, and expended, and lent and advanced by this deponent to the said *W. Poole*, and at his like request. The objection was, that the affidavit did not state that the money laid out and expended was laid out and expended for the defendant. *Young v. Gulin* (a).

Comyn contra.

LORD TENTERDEN C. J. An allegation in an affidavit to hold to bail, is conclusive on the defendant. It is not traversable. It ought, therefore, to be certain. We must not intend any thing in such affidavit; it would lead to much confusion and irregularity, if we were to hold this affidavit to be sufficient.

Rule absolute for discharging the defendant out of custody.

1829

Monday,
June 1st.

MORTON and THOMPSON against GREY and
BOTHWICK.

Where there are two defendants, one of whom is served with process and appears, but the other cannot be served, the plaintiff must obtain time to declare, as where there is one defendant only.

A RULE nisi had been obtained by *Chitty*, for setting aside the declaration, and all proceedings thereon, for irregularity. It appeared by the affidavits for the rule, that the defendant *Bothwick* was served with a copy of a latitat, issued on the 28th of April 1828, returnable on *Wednesday* next after one month from *Easter*, 7th of May, and on the 21st of October filed commitment bail. That the plaintiffs did not take any farther proceedings until the 21st of May 1829, when a declaration against both defendants was delivered, with notice to plead in eight days; that on the following morning the declaration was returned to the plaintiffs attorney, and he was told that it was irregular. The plaintiffs never served any rule, for time to declare against the defendants, on *Bothwick*, or his attorney. The affidavit in answer shewed, that the plaintiffs had been unable to serve *Grey* with process until the present *Easter* term, and upon this

Hutchinson shewed cause, and contended that it was not necessary to obtain time to declare, when one of two defendants had been out of the way and could not be served with process.

Per Curiam (after consulting the master). The practice is certified to be, that time must in that case be obtained, in the same manner as where there is one defendant

defendant only. The proceedings are therefore irregular, and must be set aside.

Rule absolute (a).

(a) See *Sykes v. Bauwens*, 2 N. Rep. 404.

1828.]

MORTON
against
GARY.

JARDINE and Others, Assignees of NATHANIEL
PHILLIPS against LEWIS.

THIS was an action to recover the balance of a banking account due from the defendant to the bankrupt, who was a banker at *Haverfordwest*. At the trial of the cause before *Gaselee J.*, at *Hereford* Summer assizes 1828, a verdict was found for the plaintiffs, with 35*l.* damages. It appeared that both the defendant and the bankrupt resided in *Wales* at the time when the cause of action accrued, and long before, and were still resident there, but no proof was given of the actual service of the writ in this cause upon the defendant. On this evidence, *Russell Serjt.* for the defendant applied to the learned Judge to certify under the 5 G. 4, c. 106 s. 21. that the cause of action arose in *Wales*, and that the defendant was resident in the dominion of *Wales* at the time of the service of the writ, or other mesne process in this action, so that the defendant might be entitled to a judgment of nonsuit; but *Campbell*, opposed the application, and referred to the cases of *Mortimer v. Harris*, and *Timmins v. Howell*, tried before *Bosanquet Serjt.* at the *Hereford* assizes, in which, on similar evidence, the learned Serjt. had refused to certify, because the actual service of the writ was not proved. He also referred to *Jones v. Kenrick* (a), tried before

Monday,
June 1st.

To entitle a defendant, who at the time of the service of the writ was resident in *Wales*, to costs, under the 5 G. 4. c. 106 s. 21. the Judge who tried the cause must certify that the defendant was then resident in *Wales*. It is not sufficient to state in the certificate the evidence from which such conclusion may be drawn.

(a) 8 B. & C. 337.

1899]

JAMES L.
JAMES L.
JAMES L.

Lord *Tenterden*. The learned Judge took time to consider, and afterwards granted the following certificate:— I do hereby certify that *it appeared upon the evidence* given on the trial of this cause, that the cause of action arose in the principality of *Wales*, and it was proved by persons who lived a few miles from the defendant's place of residence, that he had been resident for the last ten years in the dominion of *Wales*; that applications for payment were made by the bankrupt before the bankruptcy, and by the assignees after the bankruptcy, by letters directed to the defendant in *Wales*; and it did not appear that he had any other place of residence, or was ever out of *Wales*, but no evidence was given of the issuing or service of the writ, or other mesne process in this action, or of the place in which the defendant actually was at the time of the service of such writ or other mesne process. I wish the opinion of the Court upon the construction of the act, as I understand certificates have been refused where the actual service of the writ has not been proved. If the Court be of opinion, that the above facts warrant a general certificate in terms of the act, I have no objection to give it. In *Hilary* term last, *Russell* Serjt. obtained a rule nisi for entering on the roll a suggestion of the facts stated upon this certificate, and a judgment of nonsuit pursuant to the statute.

Campbell and *John Evans* now showed cause. The learned Judge in this certificate has not, to use the word of the act of parliament, "*testified*" the facts which would warrant the entry suggested. He states that certain evidence was given of those facts, but he has not drawn the conclusion from the evidence without which

which judgment of nonsuit cannot be entered. Besides, it has been held that proof of service of the writ is necessary to warrant the certificate.

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JAMES
AGNEW
LAWYER

Russell, Serjeant contra. The certificate is sufficient in order to entitle the party to enter on the roll a suggestion of the facts stated in it. The act of parliament requires, in order to entitle the party to enter such suggestion, that it shall have appeared at the trial that the cause of action arose in *Wales*, and that the defendant was resident there at the time of the service of the writ, and that it shall be so testified by the Judge. Here the Judge has certified that it did appear upon the evidence that the cause of action arose in *Wales*, and he has stated the evidence from which the conclusion is irresistible that the defendant was resident in *Wales* at the time of the service of the writ. [Bayley J. Ought not the Judge to have drawn his conclusion from the evidence that the defendant was resident in *Wales* at the time of the service of the writ, and to have so certified?] That fact sufficiently appears to the Court, from the certificate. The question therefore arises, whether it be sufficient to entitle a defendant to his costs to shew that he was resident in *Wales* at the time of the service of the writ, without showing that he was then actually in *Wales*? The word "resident" implies the place where the party is domiciled, not the place where he may happen to be when the writ is served; for if it were otherwise, a person who ever goes out of the principality will be liable to be sued for the smallest sum in the courts at *Westminster*; a creditor has only to watch him over the border, and serve him; and even the day-labourers, who go to harvest work, will stand in the

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JARDINE
against
LEWIS.

the same situation. The word must be construed with reference to the general object and intention of the act, as the word householders has been in the 43 *Eliz. c. 2.*, *Rex v. Poynder (a)*, and *inhabitants* in the statute of bridges; and according to the rule of construction laid down in *Rex v. Hall (b)* by Lord Tenterden C. J. "that the meaning of particular words in acts of parliament, as well as in other instruments, is to be found in the subject or occasion on which they are used, and the object that is intended to be attained." In *Jones v. Kenrick (c)* there was no certificate; and there Lord Tenterden, at Nisi Prius, said no more than that if a defendant was served with a writ while he resided out of the principality of *Wales*, the case was not within the act of parliament. In many instances it may be impossible for the defendant to prove the actual service of the writ; he may not know the person who served him, and no other person may have been present at the time of the service.

Lord TENTERDEN C. J. It would be a dangerous precedent to admit a certificate not in the proper form. The Judge must draw his own conclusion; we cannot do it for him.

Rule discharged.

(a) 1 B. & C. 178.

(b) 1 B. & C. 123.

(c) 8 B. & C. 337.

1829.

The KING *against* WILLIAMS. (a)

INDICTMENT for a forcible entry into a dwelling-house, alleged that *William Lewis* was interested in the premises for a term of years unexpired at the time of the alleged offence, and concluded contra formam statuti. The indictment was framed on the 21 *Jac.* 1. c. 15., which gives to Judges, in cases of forcible entry, the power to give like restitution of possession to tenants for terms of years, tenants by copy of court roll, &c. &c., as under the statute 8 *H.* 6. c. 9. they might give unto tenants of any estate of freehold. At the trial before *Vaughan B.* at the Summer assizes for the county of *Monmouth* 1828, *Lewis*, the party dispossessed and the prosecutor of the indictment, and his wife, were called as witnesses to support the charge. They were objected to as incompetent by reason of the direct interest which *Lewis* had in the event of the prosecution, inasmuch as on a conviction he would be entitled to judgment of restitution; but the learned Judge, though he entertained doubts as to the admissibility of their evidence, received it. Their evidence was material. The jury having returned a verdict of guilty, a rule nisi was obtained for a new trial, on

Upon an indictment founded on the stat. 21 *Jac.* 1. c. 15. or 8 *Hen.* 6. c. 9., whereby justices are empowered to give restitution of the possession of the lands entered upon by force, or holden by force, to the respective tenants thereof; the tenant, whose land has been entered upon, or withholden by force, is not a competent witness.

(a) Two or more of the Judges of this court sat, as on former occasions, from *Tuesday* the 2d to *Saturday* the 6th *June*, and from *Monday* the 25th to *Thursday* the 19th *June*, inclusive. During that period, this and the following cases were decided.

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the ground that the witnesses were incompetent; against which

Maule, at the sittings in banc after last *Hilary* term, shewed cause. It is by no means clear, that the judgment to be given on conviction in this case would of necessity be judgment of restitution; for it has been considered, that although the statute was imperative on the justices below to award restitution, it was not imperative on this court (a). But, admitting that the judgment of restitution would follow as a necessary consequence, still the prosecutor is a competent witness. The offence of forcible entry is not created by statute; it existed at common law, and is an offence in the suppression of which the community have a direct and primary interest. Then, a statute conferring a benefit on a prosecutor which he did not before possess, in order to supply a motive for the performance of his duty, ought not to deprive the crown of the benefit of his testimony, and thus be construed so as to defeat its own object. Thus, although the statute 21 *H. 8. c. 11.* gives a writ of restitution to the owner of stolen goods who has prosecuted the felon to conviction, such owner has always been received as a competent witness. [*Parke J.* There the statute gives restitution where the felon shall be attainted "by reason of evidence given by the party robbed, or owner of the money, &c. or by any other by their procurement," and therefore expressly recognizes the owner as a competent witness.] In an action on the 2 *G. 2. c. 3.* for bribery at an election, a party is a competent witness, although an action is pending against

(a) *Dalton's Justice*, c. 154., cited in *Res v. Marrow*, *Cas. temp. Hardw.* 174.

himself

himself for bribery at the same election, and although he intends to avail himself, as a first discoverer, of the defendant's conviction, in order to relieve himself from the penalty for which he is sued, *Heward v. Shipley* (a). So also in a prosecution on the 9 *Ann. c. 14. s. 5.* the loser of money at cards has been holden competent to prove the loss, *Rex v. Luckup* (b); and a prosecutor on a prosecution for the penalty of 500*l.* under the 23 *G. 2. c. 13. s. 1.* for seducing artificers, is also competent, *Rex v. Johnson* (c), although in each case the witness may be entitled to a share of the penalty. In criminal cases, the interest of the public, on whose behalf the prosecution is chiefly carried on, prevents those circumstances from operating as a disqualification which might render the party incompetent in a civil cause. Thus when statutory rewards existed, payable on the conviction of offenders, the party expecting the reward was always admitted as a witness in support of the charge. So, rewards offered by private individuals at the present day, to be paid on the very event of the prosecution, do not disqualify. And in the case of forcible entry, it is not to be supposed that the statute, by offering an additional advantage to the prosecutor for the suppression of violent and illegal attempts to disturb peaceable possessions, was intended to preclude him from being a witness, more especially at a time when the strong inclination of both the legislature and the courts was to afford facilities to prosecutions, and add weight to the power of the crown.

Russell Serjt. and *Talfourd* contra. There is no sound distinction between the circumstances which dis-

(a) 4 *East*, 180.(b) *Willes*, 425, cited in note.(c) *Ibid.*

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qualify a witness on the ground of interest in civil, and those which render him incompetent in criminal cases. The contrary notion and the confusion which has been sometimes introduced into this subject, arises partly from confounding the doctrine which prevents the prosecutor from being disqualified as a party in the cause, with that which is applicable to the question of interest; and partly from overlooking the variations which have from time to time existed in the construction of the rule as to interest in civil actions. It is true that a prosecutor is not incompetent as prosecutor, because although he institutes the proceeding it is conducted in the name of the king, and for public purposes, and because the prosecutor is deemed by law to have no interest in the event. But as soon as it is shewn that he has a direct and tangible interest in the event, he is then disqualified, not because he is also prosecutor, but because he has such interest as renders it unsafe to admit his testimony. Before the cases of *Bent v. Baker* (a) and *Smith v. Prager* (b) had established the clear rule which now prevails, that no mere interest in the subject-matter, but only a direct interest in the event of the suit shall disqualify a witness, the rule as to a disqualifying interest will be found to have varied at different times; and it will also be found on examining the contemporaneous cases in civil and criminal courts, that they have been affected by the same considerations, and kept even pace with each other. Even the case of forgery, where the party whose writing was charged to be forged was holden incompetent, was not at the time when it first prevailed so anomalous as it has been

(a) 3 T. R. 27.

(b) 7 T. R. 60.

generally

generally supposed; for at that time a direct interest in the question was considered sufficient to disqualify, without reference to the consideration whether the verdict would be evidence for or against the witness; and there, although a negative answer of the witness to the question, whether the handwriting charged to be a forgery was his, would not have been evidence, an affirmative answer would have been evidence against him in any action on the instrument charged as a forgery, so that he had a direct interest, according to the then existing rule, in giving an answer one way rather than the other. In criminal cases the interest of the public is not (as seems in former times to have been sometimes supposed) that parties accused should be convicted without reference to their guilt or innocence, but that truth should be elicited and justice done, and the rules of evidence, which must be assumed to be the best recognized means of obtaining those ends, are consequently the same in criminal cases as in cases between party and party. Every exception to this rule rests on the peculiar words or obvious meaning of the statute by which it is created. Thus, the statute 21 H. 8. c. 11., which has been referred to as giving the restitution of stolen goods, contemplates, in its very terms, the admission of the party robbed as a witness, and the statutes which gave rewards had the same effect, or they would have had no effect at all. In the case of *Heward v. Shipley* (a), Lord *Ellenborough* expressly treats these cases, and that of the party robbed, under the statute of *Winton*, as cases of parliamentary capitulation. In the case of *The King v. Boston* (b), where all the principal cases relative to competency in

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(a) 4 East, 180.

(b) 4 East, 572.

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criminal proceedings were reviewed, it was held that a prosecutor was a competent witness on an indictment for perjury, though the perjury assigned related to the subject-matter of a cause then standing for trial in which he was defendant, but this was expressly on the ground that he could not avail himself of the conviction at law or in equity; and in this case the rules of evidence in civil and criminal cases were represented as resting on the same principles. And so they have always been considered. Thus it was laid down by Lord *Hale* (a), that on an indictment for treason, "if any man hath the promise of the lands or goods of the party, if attainted, he is no lawful witness to prove the treason." So it is said by *Buller J.* (b) "In an indictment for perjury on the statute of *Elizabeth*, the person injured cannot be a witness, because the statute gives him 10*l.*; but in an indictment at common law he may be a witness." This is the precise distinction which exists in cases of indictment for forcible entry at common law and on the statute; in the former case the prosecutor is competent because he derives no direct advantage from the conviction; in the latter he is incompetent because the statute gives him restitution. By the first proceeding, which any one may institute, the public peace is sufficiently protected, but if the latter be adopted by a prosecutor in preference, which can only be for his private advantage as an individual, he must obtain that advantage by the testimony of others.

Cur. adv. vult.

BAYLEY J. now delivered the judgment of the Court.

(a) 1 *Hale*, 302.

(b) *Bull N. P.* 289.

This

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This was an indictment against the defendant for a forcible entry, and the question was, Whether the party grieved, the party upon whom the forcible entry was made and his wife, were competent witnesses or not? The indictment was not an indictment at common law, but upon the statute 21 *Jac.* 1. c. 15., which gives to justices in cases of forcible entry on the lands or tenements of tenants for terms of years the same power of awarding restitution of possession, as was given to them as to tenants of the freehold by the statute 8 *Hen.* 6. c. 9. s. 3. By that statute justices of the peace may enquire by the people of the same county, as well of them that make (such) forcible entries in lands and tenements, as of them which the same hold with force; and if it be found before any of them, that any doth contrary to this statute, then the said justice or justices shall cause the lands and tenements so entered or holden as aforesaid to be resealed, and shall put the party so put out in full possession of the same lands and tenements so as aforesaid entered or holden. It was upon this provision for resealing and restoring the land that the objection was grounded, for if the party grieved was entitled to restitution, he had a direct interest in the event of the suit. Two answers were made: one, that though the justices below would have been bound to award restitution upon a conviction below, the Court of King's Bench was not; and the other, that the legislature could not be taken to have intended, by the additional benefit it confers, to have narrowed the means by which the offence was to be proved; and that, as the party grieved would have been competent before that statute, he was competent still. The first ground was not very strongly pressed, one case only was relied on, and

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that is clearly distinguishable; and when it is considered that a certiorari only substitutes this court for the court below, whatever ought to have been done there had the case remained there, it must be the duty of the court here to do when the case is removed. The second was the point chiefly relied upon, and it was insisted, that by analogy to the cases of rewards and other statutable benefits, it might be considered as a rule in criminal cases, that by a statute conferring a benefit upon a person who, but for that benefit, would have been a witness, his competence is virtually continued, and he is as much a witness after that benefit is conferred as he would have been before. The case of rewards is clear on the grounds of public policy, with a view to the public interest, and because of the principle upon which such rewards are given. The public has an interest in the suppression of crime and the conviction of guilty criminals; it is with a view to stir up greater vigilance in apprehending, that the rewards are given, and it would defeat the object of the legislature, by means of those rewards to narrow the means of conviction, and to exclude testimony which otherwise would have been admissible. It is upon the principle, therefore, that the exclusion of persons entitled to rewards would be inconsistent with the spirit of the acts giving the rewards, and against the grounds of public policy, that their competence is virtually continued.

The instance of rewards given by private individuals, which was mentioned in the argument, stands upon a different principle, viz. that the public have an interest, upon public grounds, in the testimony of every person who knows any thing as to a crime, and that nothing private individuals can do will take away the right the public have.

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The argument from the right of restitution under the 21 H. 8. c. 11., notwithstanding which the owner, who is to have such restitution, is constantly admitted a witness, received its answer during the discussion upon a reference to the statute by my Brother *Parke*; for that statute expressly provides, that if a felon who robs or takes away any money, goods or chattels, be attainted by reason of evidence *given by the party robbed, or owner of the money, &c.* or by any other by their procurement, the party so robbed, or owner, shall be restored to his money, and the Court shall award them writs of restitution.

In *Heward v. Shipley* (a), (which followed and was supported by *Bush v. Ralling* and *Phillips v. Fowler*, cited *Sayer* 291.) the witness was considered as competent, notwithstanding his interest, from the spirit and principle of the act 2 G. 2. c. 24.; and Lord *Ellenborough*, in his peculiar characteristic manner of expressing himself said, "he thought the statute had given a parliamentary capacitation to the witness."

The cases cited from the note in *Willes* 425. of *Rex v. Luckup* and *Rex v. Johnson*, that the loser of money at cards is a competent witness to prove the loss on a prosecution under the 9 Ann. c. 14. s. 5., and a prosecutor under the 23 G. 2. c. 13. s. 1., upon a prosecution for the seduction of artificers, is competent on the part of the crown (if those cases are confined, as I apprehend they are, to the cases of indictments,) prove nothing upon this case, because, the event of the prosecution, whichever way it be, will not advance or prejudice the witness. For, in each case the penalty is not recoverable on the indict-

(a) 4 East, 180.

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ment, there must be a distinct suit for it, the conviction on the indictment would be no evidence in a suit for the penalty, and the penalty is not confined in one case to the loser of the money, nor in the other to the prosecutor of the indictment; but it is given, in the former, wholly to such person or persons as shall sue for the same by action, and in the other, one moiety to the king, and a moiety to the use of such person or persons as shall sue for the same. The prosecution under each statute is to be by indictment or information, and the penalty in one case expressly, and in the other by implication, must be recovered by action. The form of each of these cases shews clearly they were the proceedings by indictment or information. *Rex v. Teasdale* (a), was an indictment on the 21 G. 3. c. 37. s. 1. for exporting machines used in the manufactures of this country. By that statute the offence is made indictable, the offender is to forfeit the machines, &c. and also 200*l.*, and is to be imprisoned for twelve months and until such forfeiture is paid. By s. 7. the forfeitures (where it is not otherwise provided), are to go to the informer. The informer was called as a witness, and objected to on the ground of interest. Lord *Kenyon* overruled the objection, saying, the point had long since been decided in a case in *Burr.* soon after Lord *Mansfield* came into the Court, as to cases of bribery.

Bush v. Ralling, *Sayer*, 289. is probably the case to which Lord *Kenyon* referred. It occurred in the interval between the death of Sir *Dudley Ryder* and the appointment of Lord *Mansfield*, in *Trin.* 1756, when there was

(a) 3 *Esp.* 68.

no Chief Justice. It was an action on the bribery act, 2 G. 2. c. 24., and *Harvey*, the person bribed, was received as a witness. On rule nisi for new trial two objections were made to him: one, that he was *particeps criminis*; the other, that the tendency of his evidence was to discharge him from penalties and disabilities. *Dennison J.*, who delivered the opinion of the Court (in which he said the late Chief Justice had concurred), after noticing that a *particeps criminis* was in many cases a witness, said, "but another answer deducible from a clause in 2 G. 2. c. 24. may be given. That clause discharges a discoverer, if the person discovered be thereupon convicted, from all penalties and disabilities he had incurred. This," says he, "seems to be a legislative declaration, that one person offending against this act may be a witness against another; for it is not probable the legislature should intend to discharge one offender, upon his discovering another offender against it, in such a manner that the latter be convicted, without intending at the same time, that the former should be a witness against the latter. And Lord *Mansfield* and the Court acted upon this decision as clear and unquestionable, in *Sutton v. Bishop, Burr.* 2233. This appears to explain satisfactorily Lord *Kenyon's* opinion in *Rex v. Teasdale*, and to shew the principle upon which he acted; he considered the term informer in the 21 G. 3. as equivalent to the term "person discovering" in 2 G. 2. c. 24. s. 8., and as it had been decided that the legislature must have intended that the person designated as "the person discovering" in the one case should be a witness, it must be taken it had the same intention as to the person designated by the word "informer" in the other. Both were cases of secrecy, and the detection and punish-

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punishment of each offence of importance to the public. This, therefore, was a case in which it was implied from the tenor and provisions of the statute, that the legislature meant to make competent a person who otherwise would not have been so, and instead of breaking in upon the general rule, merely establishes an exception. The general rule in criminal as well as civil cases is that a person interested in the event is not competent. Here the husband and wife were both interested in the event, because a conviction would entitle them to a judgment of restitution. Is there then any thing in the nature of the case from which we are warranted in implying such an exception as was implied in *Bush v. Ralling*, *Heward v. Shipley*, *Rex v. Teasdale*, and the reward cases? Nothing. The public interest will still have the protection of a common law indictment, and there is nothing from which an inference can fairly be drawn that it was with a view to the public interest, and not for the sake of the private benefit of the party grieved, that the provision for restitution was introduced into the statute. Where it is plain that the detection and conviction of the offender are the objects of the legislature, the case will be within the exception, and the person benefited by the conviction will, notwithstanding his interest, be competent. Where this is not the case, the general rule will be applicable, and the person incompetent. For these reasons, we are of opinion that the evidence of the witnesses ought not to have been received, and consequently that the rule for a new trial ought to be made absolute.

Rule absolute.

See *Rex v. Benjan*, Ry. & M. 242.

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in Court of Exchequer. Thomas v. Phillips 9th May 1829
Redwell v. Phillips 9th May 1829
Stone v. Phillips 10th May 1829

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DECLARATION stated that the plaintiff on, &c. at

&c. at the request of the defendant bargained with the defendant to sell to him, and the defendant agreed to buy of the plaintiff a large quantity of timber, to wit, 230 feet of timber lying and being in and upon certain lands of the plaintiff, at a certain rate or price, to wit, at the rate or price of 18*d.* for each and every foot thereof, to be fetched, taken, and carried away by the defendant from the said lands of the plaintiff; and to be paid for by the defendant at the rate or price aforesaid, within a reasonable time then next following; and in consideration thereof, and also in consideration that the plaintiff at the like request of the defendant, had undertaken and faithfully promised the defendant to permit and suffer the defendant to fetch, take, and carry away the said timber from the lands of the plaintiff, the defendant undertook and faithfully promised the plaintiff to fetch, take, and carry away the timber from the lands of the plaintiff, and to pay the plaintiff for the same at the rate aforesaid, within a reasonable time. Breach, that the defendant refused to fetch and carry away the timber or to pay for the same. There were counts for goods

A. being the owner of trees growing on his land, verbally agreed with *B.*, while they were standing, to sell him the timber at so much per foot. *B.* afterwards offered to sell the butts of the trees to a third person, and said he would convert the tops into building stuff. *A.* afterwards, by letter, required *B.* to pay for the timber, which he, *B.*, had bought of him. *B.* wrote a letter in answer, stating that he had bought the timber, but that he had bought it to be sound and good, and that it was not so: Held, first, that the contract was not a contract for the sale of lands, tenements, or hereditaments,

or any interest in or concerning the same within the meaning of the fourth section of the statute of frauds, but that it was a contract for the sale of goods, wares, and merchandizes, within the seventeenth section.

Secondly, that as the purchaser did not, in his letter, recognize the absolute contract described in the vendor's letter, but stated one conditional as to quality, there was no note in writing of the bargain to satisfy the statute of frauds.

Thirdly, that there had been no part acceptance or actual receipt of the goods to satisfy the statute, inasmuch as there was nothing to shew that the purchaser had divested himself of his right to object to the quality of the goods, or that the seller had lost his lien for the price.

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bargained and sold, and goods sold and delivered. Plea, the general issue. At the trial before *Vaughan B.* at the Summer assizes for the county of *Worcester* 1828, it appeared that this action was brought to recover 17*l.* 3*s.* 6*d.* the value of 229 feet of ash timber, at 1*s.* 6*d.* per foot, which the plaintiff had agreed to sell to the defendant under the following circumstances:— The plaintiff, the proprietor of a coppice, had given orders to have some ash trees cut down, and the defendant on the 7th of *April*, while the trees were in the course of being cut, and after two of them had been actually felled, came to the coppice, and the plaintiff pointed out to him the trees, which were numbered. The defendant, after he had looked at them, said to one of the bystanders, that he had made a good bargain, and told one of the persons who was cutting them, to tell the other men to cross cut them fair, and they were cut accordingly. The defendant afterwards said he had bought ten trees only, and that the reason he did not have them was, that they were unsound. After the trees were cut they measured 229 feet 7 inches. The person who measured them afterwards met the defendant, who asked him if he had measured the timber at *Mr. Smith's*, and receiving an answer in the affirmative, the defendant offered to sell him the butts, (which he alleged he had bought of *Mr. Smith*,) but this not being acceded to, the defendant asked him if he knew any person who wanted any butts, and then said he would go to *Mr. Smith's* and convert the tops into building stuff. The defendant not having taken the timber away, the attorney of the plaintiff, by his direction, wrote the following letter to the defendant upon the subject: — “ Sir, I am directed by
Mr.

Mr. Smith, of Norton Hall, to request you will forthwith pay for the ash timber which you purchased of him. The trees are numbered from one to fourteen, and contain, upon a very fair admeasurement, 229 feet 7 inches. The value at 1s. 6d. per foot amounts to the sum of 17l. 3s. 6d. I understand your objection to complete your contract is on the ground that the timber is faulty and unsound, but there is sufficient evidence to shew that the same timber is very kind and superior, and a superior marketable article. I understand you object to the manner in which the trees were cross cut, but there is also evidence to prove they were so cut by your direction. Unless the debt is immediately discharged, I have instructions to commence an action against you." In answer to this letter the defendant wrote to the plaintiff's attorney as follows:—"Sir, I have this moment received a letter from you respecting Mr. Smith's timber, which I bought of him at 1s. 6d. per foot, *to be sound and good*, which I have some doubts whether it is or not, but he promised to make it so, *and now denies it*. When I saw him he told me I should not have any without all, so we agreed on these terms, and I expected him to sell it to somebody else." Upon this evidence it was objected by the defendant's counsel that the contract was one for the sale of growing trees, and, therefore, for the sale of an interest in land, and he cited *Scorell v. Roxall (a)*, or assuming that it was a contract for the sale of goods, wares, and merchandizes, the price being 10l. and upwards, and there being no note or memorandum of the contract in writing, the action was not maintainable; the learned judge directed the jury to

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(a) 1 *Younge & Jervis*, 396.

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find a verdict for the plaintiff for 17*l.* 3*s.* 6*d.* but reserved liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

Russell Serjt. and *Shutt* now showed cause. There was not in this case any contract for the sale of lands, tenements, or hereditaments, or of any interest in or concerning them, within the meaning of the fourth section of the statute of frauds. The trees were in the course of being felled at the time of the bargain and sale; some of them were felled when the bargain was concluded. The bargain, therefore, was not for standing trees, but for the produce of the standing trees, viz. timber, at so much per foot. The word *timber*, strictly speaking, does not import growing trees, but that portion of the trees (when felled) which makes wood fit for building. *Scorell v. Boxall* (a) was an action of trespass by the vendee of standing underwood, which was to be cut by the vendee, and the question was, whether a mere verbal contract for the sale of such underwood gave such a possession to the vendee as would entitle him to maintain trespass against the defendant for cutting and carrying it away, and the Court of Exchequer held that it was a contract for the sale of an interest in land, and therefore that it ought to have been in writing to give any interest to the vendee. Here the contract was not for land, or any interest in land, but for the timber, which would be produced by the trees when they should be cut and severed from the freehold. The defendant in this case could not have entered on the land and cut a single tree; and that is the test to try

(a) 1 *Youngs & Jervis*, 396.

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whether the standing trees were sold, or that only which the standing trees should when cut produce. If the trees had been sold there might have been some ground for saying that the vendee took an interest in the land, but the timber only being sold, then the produce of the trees when cut down and severed from the freehold is the thing contracted for. Considering the word timber to denote only trees when severed from the freehold, will reconcile with the modern cases the opinion of *Treby* C. J. and *Powell* J. in 1 *Ld. Raym.* 182., viz. that a sale of timber growing upon the land may be by parol, because it is but a bare chattel. That opinion is cited as an authority in *Buller's N. P.* 282., and without disapprobation by *Holroyd* J. in *Mayfield v. Wadsley (a)*, where the question was, whether a contract for the sale of a crop of wheat was one for the sale of an interest in land within the fourth section of the statute of frauds. It is not the circumstance of a thing existing in a growing state in the soil at the time of the contract that will make it an interest in the land. That must depend on circumstances. A sale of crops or trees, or other matters existing in a growing state in the land, may or may not be an interest in land according to the nature of the agreement between the parties, and the rights which such an agreement may give. If it give to the vendee an exclusive right to the land for a term, for the purpose of making a profit of the growing surface, it will constitute an interest in the land. In *Crosby v. Wadsworth (b)* the vendee of the crop of grass might have maintained trespass, for by the terms of the contract he was to mow the grass, and must therefore have

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(a) 3 B. & C. 364.

(b) 6 East, 602.

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had the possession of the land for that purpose. In *Emmerson v. Heelis* (a) no time was stipulated for the removal of the turnips, and *Bayley J.*, in *Evans v. Roberts* (b), stated, that in his opinion the turnips at the time of the sale were chattels. In *Parker v. Staniland* (c) the owner of a close cropped with potatoes made a contract on the 21st of *November* to sell them at so much per sack, and the purchaser was to raise them from the ground immediately, and that contract was held not to give the vendee any interest in or concerning land. In *Warwick v. Bruce* (d) the principle was recognized that a contract giving an interest in land within the statute of frauds must confer an exclusive right to the land for a time, for the purpose of making a profit of the growing surface. All the authorities were reviewed in *Evans v. Roberts* (e), where it was held that a verbal agreement made on the 25th of *September* for the sale of a then growing crop of potatoes was not a contract for the sale of any lands, tenements, or hereditaments, or any interest in or concerning them, within the fourth section of the statute of frauds. But it will be said that this was a contract for the sale of goods, wares, and merchandizes, for the price of 10*l.* and upwards, within the seventeenth section, and that there has been no part-acceptance nor memorandum in writing, of the bargain. But that section of the statute does not apply to a sale of timber in a course of being felled or to be felled. It is an executory contract for so much timber, to be produced out of trees upon which work and labour is to be bestowed by the vendor for the

(a) 2 *Taunt.* 38.(b) 5 *B. & C.* 838.(c) 11 *East*, 362.(d) 2 *M. & S.* 205.(e) 5 *B. & C.* 829.

benefit

benefit of the vendee. Something was required to be done to put the subject-matter into the state in which it was to be in order to be delivered according to the contract. It was not a contract, therefore, for the sale of goods, wares, and merchandizes, but for work and labour and materials found and provided, *Towers v. Osborne* (a), *Clayton v. Andrews* (b), *Groves v. Buck* (c), *Buxton v. Bedall* (d). Assuming, however, that there was a contract for the sale of goods, wares, and merchandize, there was in this case a sufficient acceptance of part of the goods sold. The principle is, that if the purchaser deals with the commodity as if it were in his actual possession, this will supersede the necessity of proving actual acceptance, *Chaplin v. Rogers* (e), *Elmore v. Stone* (g). Here the defendant dealt with the timber as if it was in his possession, for he gave directions as to cross-cutting, which might make the timber less saleable, and he offered to sell the butts. It is in this respect like *Blenkinsop v. Clayton* (h), where a person had bargained for a horse then in the stable, and soon afterwards brought in a third person, and stated to him that he had bought the horse, and offered to sell it to such third person for a profit of 5*l*. Lastly, the answer of the defendant to the attorney's letter was a sufficient memorandum in writing of the contract, for it is clear that two distinct writings may be coupled together, and constitute a memorandum within the intention of the statute, *Saunderson v. Jackson* (i), *Schneider v. Norris* (k). The letter of the plaintiff's attorney con-

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(a) 1 *Str.* 506.(c) 3 *M. & S.* 178.(e) 1 *East*, 192.(h) 7 *Taunt.* 597.(k) 2 *M. & S.* 286.(b) 4 *Durr.* 2101.(d) 3 *East*, 503.(g) 1 *Taunt.* 458.(i) 2 *Dos. & Pull.* 238.

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tained an assertion of the contract, specifying the quantity, quality, and price of the timber, and the answer confirms it. This case is distinguishable from *Richards v. Porter* (a). There the letter of the purchaser falsified the contract, for he wrote that the hops had not been sent at the time required by the contract.

Jervis contrà, was stopped by the Court.

BAYLEY J. I am of opinion that there was not in this case any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them within the meaning of the fourth section of the statute of frauds. The contract was not for the growing trees, but for the timber at so much per foot; *i. e.* the produce of the trees when they should be cut down and severed from the freehold. But independently of the point made on that section, there were three other questions made: first, it was said that this was a mixed contract for goods and chattels, and for work and labour to be bestowed and performed by the plaintiff for the defendant. It seems to me, that the true construction of the bargain is, that it is a contract for the future sale of the timber when it should be in a state fit for delivery. The vendor, so long as he was felling it and preparing it for delivery, was doing work for himself and not for the defendant. *Garbutt and Another v. Watson* (b) is in point. There the plaintiffs, who were millers, agreed to sell to the defendant, a corn-merchant, 100 sacks of flour at 50s. per sack, to be got ready by the plaintiffs to ship within three weeks. There was no memorandum in writing of the contract. The flour was

(a) 6 B. & C. 437.

(b) 5 B. & A. 613.

not at that time prepared, and it was there held, that it was a contract for the sale of goods, wares, and merchandize within the meaning of the seventeenth section of the statute of frauds. I think, therefore, that the contract in this case was only a contract for the sale of goods, wares, and merchandize within the seventeenth section of the statute, and that there ought to have been a note or memorandum of it in writing, or a part-acceptance, earnest, or part-payment. But it is said that the defendant has recognized in writing the contract stated in the letter of the plaintiff's attorney. I agree that if there had been a letter written by the seller (or his agent) to the buyer, specifying the terms of a contract, and the buyer in his answer had recognized that contract, there would have been a note in writing of the bargain, sufficient to satisfy the statute. But the defendant in this case does not recognize the contract stated in the letter of the plaintiff's attorney. The contract as described in the two letters differs essentially as to the quality of the things to be sold. In the letter of the plaintiff's attorney the contract is spoken of as one for the absolute purchase of trees at 1s. 6d. per foot, without reference to quality; the defendant says, that it was part of the contract that the timber should be sound and good; that Mr. *Smith* denied it, and refused to let him have part without all, and that he had expected he would have sold it again. It is clear, therefore, that the vendee did not consider it a binding bargain. What the real terms of the contract were, is left in doubt, and must be ascertained by verbal testimony. The object of the statute was, that the note in writing should exclude all doubt as to the terms of the con-

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tract (a), and that object is not satisfied by the defendant's letter. I think, therefore, there was no note in writing of the contract sufficient to satisfy the statute.

The next question is, Whether there was any acceptance or actual receipt of part of the property sold, so as to bring the case within the exception in the seventeenth section? and I think that there was no such acceptance or actual receipt. In all the cases cited, there has been something equivalent to an acceptance. In *Chaplin v. Rogers* (b) the vendee had sold the hay again, and the jury from thence drew the conclusion that there had been an actual acceptance. In *Elmore v. Stone* (c) the horses were purchased of a horse-dealer who kept a livery-stable. The buyer directed the seller to keep the horses at livery, and they were transferred from the sale to the livery-stable. The purchaser became liable to the livery-stable keeper for the keep, which could not have been the case unless the horses were supposed to have gone into his possession. The direction given by the vendee was considered equivalent to an acceptance or actual receipt of the horses. The vendor was converted into the agent of the vendee for the keep of the horses; and they might be considered as much in the possession of the vendee as if they had been in his own stable. For these reasons I am of opinion, that there was not in this case any contract for the sale of an interest in land within the meaning of the fourth section of the statute, but that the contract was for the sale of goods, wares, and merchandize: that there was no

(a) See *Seagood v. Meale*, *Prec. Chan.* 560. *Clerk v. Wright*, 1 *Aik.* 12. *Ayliff v. Tracy*, 2 *P. Wms.* 64.

(b) 1 *East*, 194.

(c) 1 *Taunt.* 458.

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sufficient note in writing of the bargain, nor any part-acceptance of the goods sold. The rule for entering a nonsuit must, therefore, be made absolute.

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LITLEDAL J. I am of the same opinion. The intention of the legislature in making the statute in question, appears by the preamble to have been to prevent fraudulent practices, commonly endeavoured to be upheld by perjury and subornation of perjury; and for that purpose, in order to prevent them it requires that the terms of contracts shall be reduced into writing, or that some other requisite should be complied with to shew manifestly that the contract was completed. I infer from the preamble, that the legislature intended to embrace within some of its sections the subject-matter of all contracts. The various contracts enumerated in the several sections of the statute, seem also to warrant that inference. The first section enacts, that parol leases shall have the effect of leases at will only. The second section excepts out of the first leases not exceeding three years, where the rent reserved during the term is two-thirds of the improved value. The third section enacts, that no leases, either of freehold or terms for years, shall be assigned, granted, or surrendered except by deed or note in writing. The first three sections apply to contracts, which, before the statute, were usually, though not necessarily, under seal. The fourth section applies to those parol promises or agreements, which, before the statute, were probably in most instances reduced into writing, but which need not have been so. That section enacts, that no action shall be brought in such cases, unless

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the agreement, or some note or memorandum thereof shall be reduced into writing. The agreements therein described are, a special promise by an executor to answer damages out of his own estate; or a special promise to answer for the debt of another person; or an agreement made in consideration of marriage; or any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or any agreement not to be performed within the space of one year from the making thereof. Such contracts, from their very special nature and subject-matter, would probably have been reduced into writing. The statute requires that they shall be so. The fifth and sixth sections apply to devises of lands. The seventh, eighth, ninth, tenth, and eleventh apply to declarations of trusts, and they are also required to be in writing. The twelfth section makes estates per auter vie devisable. The thirteenth, fourteenth, fifteenth, and sixteenth sections apply to judgments and executions. The seventeenth section enacts, that no contract for the sale of goods, wares, and merchandizes for the price of 10*l.* or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part-payment, or that some note or memorandum of the bargain, in writing, be made and signed by the parties to be charged by such contract, or their agents thereunto properly authorized. Now, looking to the object of the statute as recited in the preamble, I collect it was the intention of the legislature to comprehend within the fourth and seventeenth sections the subject-matter of every parol contract, the
uncer-

uncertainty in the terms of which was likely to produce perjury or subornation of perjury. A contract for mere work and labour is not specifically mentioned in those clauses: such a contract, therefore, may not be within the statute.

But where the contracting parties contemplate a sale of goods, although the subject-matter at the time of making the contract does not exist in goods, but is to be converted into that state by the seller's bestowing work and labour on his own raw materials: that is a case within the statute. It is sufficient if, at the time of the completion of the contract, the subject-matter be goods, wares, and merchandize. I cannot assent to any case which has decided that such a contract is not within the statute.

I think that the contract in this case was not a contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning the same within the meaning of the fourth section. Those words in that section relate to contracts (for the sale of the fee-simple, or of some less interest than the fee), which give the vendee a right to the use of the land for a specific period. If in this case the contract had been for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, I think it would not have given him an interest in the land within the meaning of the statute. The object of a party who sells timber is, not to give the vendee any interest in his land, but to pass to him an interest in the trees, when they become goods and chattels. Here the vendor was to cut the trees himself. His intention clearly was, not to give the vendee any property in the trees until they were cut and ceased to be part of the freehold. I think, there-
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fore, that there was not in this case any contract or sale of any interest in lands.

Then assuming the contract not to be within the fourth section, the question arises, Whether it is within the seventeenth section? It was formerly held that where the goods, which were the subject-matter of the sale, were not to be delivered till a future day, as one of the three things required by that section of the statute, viz., a part-acceptance, could not be complied with at the time of the contract, it was not a case within that section of the statute; but later authorities (*a*) have established, that such a contract, whether the goods are or are not to be delivered immediately, is within the statute. Those cases, therefore, have established, that if two of the things required by the seventeenth section can at the time of the contract be carried into effect, the case is within it, although one cannot be complied with. There is another class of cases (*b*), where the article contracted for has not existed at the time of the contract, but is to be produced by work and labour to be bestowed by the vendor; as where the contract was for a quantity of oak pins which had not been made, but were to be cut out of slabs, or for a chariot to be built. In those cases, the contract has been considered rather as a contract for work and labour, than for the sale of goods, wares, and merchandize, and not within the statute. The impression on my mind however is, that where ever the subject-matter at the time of the completion of the contract, is goods, wares, and merchandize, this section of the statute attaches upon it, although it has

(*a*) *Rondeau v. Wyatt*, 2 H. Bl. 67. *Cooper v. Elston*, 7 T. R. 14. *Alexander v. Comber*, 1 H. Bl. 20.

(*b*) *Towers v. Osborne*, 1 Str. 505. *Groves v. Buck*, 3 M. & S. 179:

become

become goods, wares, and merchandize, between the time of making and completing the contract, either by one of the parties having bestowed his work and labour upon his own materials, or by his having converted a portion of his freehold into goods and chattels. The provisions of the statute are more necessary in cases where the contract is to be executed at a future period, than where it is to be executed immediately. From the uncertainty in the terms of bargains to be completed at a future period, disputes are more likely to arise, and the consequent perjury, which it was the object of the statute to prevent. In the case of the chariot, for instance, a dispute might at any time before its completion have arisen respecting the quality of the materials of which it was to be composed, or the colour which it was to be painted, and in those respects it would have been necessary to have recourse to verbal testimony to prove the terms of the contract, which it was the very object of the statute to prevent. I am therefore of opinion that the contract in this case was a contract for the sale of goods, wares, and merchandize, within the seventeenth section. I think, also, that there is no sufficient note in writing of the contract. The plaintiff's attorney, in his letter, speaks of it as a contract for the sale of so much timber, at so much per foot, without reference to quality. The defendant in his letter states that it was a contract, with a condition that the timber should be sound and good, though the plaintiff had subsequently denied that that was one of the terms of the contract. I think, also, for the reasons stated by my Brother *Bayley*, that there was no part acceptance of the goods to satisfy the statute.

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PARKE J. The defendant could take no interest in the land by this contract, because he could not acquire any property in the trees till they were cut. The contract was for the sale of goods, wares, and merchandize, within the seventeenth section. In *Groves v. Buck* (a), it was said that that section did not apply to a sale of goods, which at the time of the contract were not capable of delivery and part acceptance. But that case was overruled by *Garbutt v. Watson* (b). It was there held, that a contract by millers for the sale of a quantity of flour, which at the time of the contract was not prepared and in a state capable of immediate delivery, was substantially a contract for the sale of flour, and not a contract for work, and labour, and materials found and provided. The true question in such cases is, as to whether the contract be substantially a contract for the sale of goods, or for work and labour and materials found. In this case, the contract was substantially a sale of goods, viz., timber at so much per foot. Then assuming that there was a contract for the sale of goods within the seventeenth section, the question is, Whether there was any note or memorandum in writing of that contract, or any part acceptance of the goods? The two letters do not, in my judgment, amount to a note in writing of the contract, because the contract stated in the letter of the plaintiff's attorney, is not adopted by the defendant in his. On the contrary, it is evident that the defendant has not assented to the contract stated by the plaintiff. Then the only question is, Whether there has been a part acceptance of the goods sold, and actual receipt of the same? In the older cases, the Court did not advert to the words of the

(a) 3 M. & S. 178.

(b) 5 B. & A. 613.

statute. But the later cases (a) have established, that unless there has been such a dealing on the part of the purchaser as to deprive him of any right to object to the quantity or quality of the goods, or to deprive the seller of his right of lien, there cannot be any part-acceptance. Here there was nothing to shew that the vendor had lost his lien for the price, or that the purchaser had lost his right to object to the quality. The rule for entering a nonsuit must therefore be made absolute.

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(a) *Howe v. Palmer*, 3 B. & A. 321. *Hanson v. Armilidge*, 5 B. & A. 559.
Carter v. Toussaint, 5 B. & A. 855. *Tempest v. Fitzgerald*, 3 B. & A. 680.

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HEANE *against* W. E. ROGERS and J. G. LLOYD.

TROVER for goods and chattels. Plea, not guilty. In an action of trover brought by a person against whom a commission of bankrupt had issued, against his assignees, At the trial before Gaselee J., at the Summer assizes for the county of Gloucester 1828, it appeared that in August 1826 a commission of bankrupt had

to recover goods which they had, as such assignees, sold, it appeared that the bankrupt had assisted the assignees by giving directions as to the sale of the goods, and that, after the issuing of the commission, he gave notice to the lessors of a farm which he held, that he had become bankrupt, and that he was willing to give up the farm, and in consequence, the lessors received the lease, and accepted possession of the premises: Held, first, that the interference of the plaintiff in the sale of his goods was referable to an intention on his part to take care of the property, and see that the most was made of it, and that it did not amount to an assent to the sale, and that he was not thereby estopped from bringing an action against his assignees.

Secondly, that he was not estopped by the act of having given up his lease to his lessors, the assignees not being parties or privies to that transaction.

The plaintiff, about two years before the issuing of the commission, had entered into an agreement for the purchase of five acres of land; one of the terms of the agreement being, that 4s. for every 1000 bricks made on the land should be paid to the vendor, in part of the purchase money. The plaintiff made bricks from clay dug from the land. During part of the time he was in partnership with two others, who had no legal or equitable interest in the land, but that partnership had been dissolved before the issuing of the commission: Held, that the plaintiff was not a person liable to the bankrupt laws within the meaning of the 6 G. 4. c. 16. s. 2.

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issued against the plaintiff, under which he was declared a bankrupt. The defendants were his assignees, and in that character had possessed themselves of and sold the goods mentioned in the declaration. The action was brought to try the validity of the commission, the plaintiff contending that he was not a trader within the meaning of the bankrupt laws. The evidence as to the trading was as follows: It appeared by the plaintiff's examination before the commissioners that on the 10th of *May* 1824, he had purchased of one Colonel *Olney* a piece of land (near *Cheltenham*) containing five acres, or thereabouts, for 2400*l.* The purchase-money was to be paid in five years, with interest at 4 per cent. The land was intended for the making of bricks, and it was agreed that 4*s.* per 1000 should be paid to the vendor in part liquidation of the purchase-money, and an agreement was signed by the plaintiff to that effect; 100*l.* deposit was to be paid in six months. A memorandum of agreement to this effect was drawn and signed by Colonel *Olney* and the plaintiff; and at the same time instructions were given to prepare a regular agreement on a stamp, which was not done. It appeared further that the plaintiff during the years 1824, 1825, and 1826, made bricks from the land in question, and sold them. The bricks were made in the usual way from soil dug from the land which the plaintiff had agreed to purchase. In *June* 1825 the plaintiff entered into partnership with *Packwood* and *Edwards* in the brickmaking business. They were to take two-thirds of the land, but there was no agreement in writing between them. That partnership was carried on till the 28th of *June* 1826, when it was dissolved; and notice of that dissolution, signed by the plaintiff and *Packwood* and *Edwards*, was,
on

on the 30th of *June* 1826, inserted in the Gazette. Before *May* 1824, the plaintiff carried on the business of a builder at *Cheltenham*, and it was insisted on his part that the five acres of land had been purchased with a view to that business; and if so, that he was not subject to the bankrupt laws. The defendants contended that even if the plaintiff was not a trader within the meaning of the bankrupt law, he was estopped by his conduct from disputing the validity of the commission. The evidence as to that point was as follows: About a week before the sale of the goods the plaintiff, the auctioneer, and the assignees, met and consulted together as to the best means of disposing of the property. The plaintiff, at the time when the commission issued, was in possession of a farm, which he held under a lease from Messrs. *Wilkins*, at an annual rent of 350*l.*, for a term of which more than a year and a half was unexpired. The farm had not yielded him any profit for the two preceding years. On the 12th of *September* 1826, the plaintiff, pursuant to the statute 6 G. 4. c. 16. s. 75., gave the following notice to *W. Wilkins, Esq.* and *W. Wilkins, Esq. the younger*: — “ I, the undersigned *James Heane*, of the city of *Gloucester*, brickmaker, dealer and chapman, a *bankrupt*, do hereby give you notice that I am ready and willing, and hereby offer to give up and deliver unto you a certain indenture purporting to be a lease of *Walsworth Hall* estate, dated the 17th of *September* 1817, made between you the said *W. Wilkins* and *W. Wilkins the younger*, of the one part, and myself of the other part; and also the possession of the messuages, lands, hereditaments, and premises therein comprised.” In consequence of this notice the lessors accepted the lease, and received possession of the premises. Upon this evidence it was contended, by the plaintiff's

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tiff's counsel, that the plaintiff having made the bricks from his own land, as a mode of enjoying the profit of it, was not a trader within the bankrupt laws, *Parker v. Wells* (a), *Sutton v. Weeley* (b); and, by the defendant's counsel, that assuming the commission to be invalid, the plaintiff, who had availed himself of it to get rid of his lease, and his liability thereon, was estopped from disputing the validity of the commission under which the defendants acted; and *Watson v. Wace* (c) was cited. The learned Judge was of opinion that the interference of the plaintiff in the sale was referable to an intention on his part to take care of the property, and to see that the most was made of it, and that it did not amount to a consent to the sale, and that he was not estopped on that ground; but that as he had availed himself of the commission to derive a benefit from it by the surrender of the lease, he was thereby estopped from saying that he was not a bankrupt. The learned Judge told the jury that, in his opinion, the defendants were entitled to a verdict; but he desired them to find specially whether the land had or had not been taken for the express purpose of making bricks, and they found that it had. He then directed the verdict to be entered for the defendants, but reserved liberty to the plaintiff to move to enter a verdict for 440*l.*, the value of the goods, if the Court should be of opinion that he was not estopped, and also that he was not a person liable to become bankrupt within the meaning of the 6 G. 4. c. 16. s. 2. A rule nisi having been obtained for that purpose,

Taunton, Campbell, and Phillpotts shewed cause. The plaintiff was a trader within the meaning of the 6 G. 4. c. 16. s. 2., which enacts, "that all persons who either

(a) 1 T. R. 34.

(b) 7 East, 442.

(c) 5 B. & C. 153.

for

for themselves, or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt." The case *Ex parte Burgess* (a) will be relied upon as an authority to shew, that the plaintiff was not a person seeking his living by the workmanship of goods or commodities. The question whether a person making bricks for sale is liable to the bankrupt laws, as a person seeking his living by buying and selling goods, is left untouched by that decision. It has, however, been much considered. Mr. *Eden*, in his Treatise on the Bankrupt Laws, states, that the general doctrine, as extracted from the modern cases, is as follows:— "Where the business of brickmaking is carried on as a mode of enjoying the profits of a real estate, it will not make the party liable to the bankrupt law; *Parker v. Wells* (b), *Sutton v. Weeley* (c). But where it is carried on substantially and independently as a trade, it will do so, *Ex parte Harrison* (d); and there is no difference where the party is a termor or entitled to the freehold, *Ex parte Gallimore* (e). The same general doctrine applies to the case of a person manufacturing alum, lime, or selling minerals from his own quarry." The true question in such cases is, whether the principal object of the party was to carry on the trade of a brick-maker, or to use the trade as a mode of enjoying the profits of the land. Where the vendor of the bricks is not the owner of the land, he must have made them to carry on a trade. Where he is the owner of the land, his object may be doubtful, and is to be ascertained by

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(a) 2 *Glyn & J.* 183.(b) 1 *T. R.* 34. *Cooke, B. L.*(c) 7 *East*, 442.(d) 1 *Bro. Ch. Cas.* 173.(e) 2 *Rosc, B. C.* 424.

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other circumstances. The facts of this case leave no doubt that the object of the plaintiff was to carry on the trade of a brickmaker; for he purchased the land, not to make a profit of it quâ land, but for the very purpose of carrying on the trade or business of a brickmaker on it. And the jury have found that he did so. In *Sutton v. Weeley* (a), and *Ex parte Burgess* (b), the parties who carried on the trade were tenants for life of the freehold. They did not purchase the land for the purpose of carrying on the trade of a brickmaker, but carried on the trade as a mode of enjoying the profit of the land which had been devised to them. In this case the business of brick-making was carried on, not as a mode of enjoying the real estate, but the real estate was purchased for the purpose of and used as the mode of carrying on the trade of brick-making. Here, too, the plaintiff carried on the trade in partnership with two other persons who had no legal or equitable interest whatever in the land. Now, in *Parker v. Barker* (c), an acknowledgment by a party that he was in partnership with one who was a trader, and that he had given directions in the concern, although no act of buying or selling during the time of the partnership was proved, was held to constitute him a trader within the meaning of the bankrupt laws. Besides, the plaintiff had no conveyance of the land. He was to pay 4s. per 1000 for the bricks. He may, therefore, be considered as having purchased of the land-owner the clay of which the bricks were made; and then the case *Ex parte Harrison* (d) shews that he is liable to be a bankrupt. But assuming that the commission cannot be supported in that respect, the bankrupt is estopped by his own acts

(a) 7 East, 442.

(b) 2 Glyn & J. 185.

(c) 1 Brod. & Bing. 9.

(d) Brown's Ch. Cas. 175.

from

from disputing its validity, for he interfered in the sale of the goods: and in *Clarke v. Clarke* (a) Lord Kenyon held, that a person who had been declared a bankrupt, and acted in the sale of his effects, was estopped from bringing an action to try the validity of the commission. Here the plaintiff also took advantage of the commission to get rid of his lease, and of the burden of performing the covenants contained in it. In *Watson v. Wace* (b) it was held, that the bankrupt could not contest the validity of the commission after he had obtained his discharge out of custody by reason of it. Now this case does not differ from that in principle, though it may in degree. There the bankrupt was in actual custody at the suit of the petitioning creditor at the time when the commission issued. Here he was bound to perform the covenants contained in that lease, at the time when the commission issued, and he relieved himself from that burden by giving notice to his lessors that he had become bankrupt, and was willing to deliver up his lease pursuant to the seventy-fifth section of the statute 6 G. 4. c. 16., and in that notice the plaintiff described himself as a bankrupt; he could not be a bankrupt unless he had previously been a trader. Having derived a benefit from the commission, it is not competent to him now to say that it was void because he was not a trader.

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Ludlow and Russell Serjts. contra. The plaintiff's interference in the sale was such as to shew, not that he assented to the commission, but that he intended to take care of the property, so that the most should be made of it. He had done nothing to entitle himself to any

(a) 6 *Exp.* 61.(b) 5 *B. & C.* 155.

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benefit under the commission. The notice to the landlord amounts to no more than a proposal on the part of the plaintiff to give up the farm. To shew that he had availed himself of the provisions of the statute, in order to take a benefit under the commission, it ought to have been proved that the assignees had previously declined to take to the lease. Besides, estoppels bind only parties and privies, not strangers. There was no privity between the defendants and the plaintiff, as to the transaction by which it is said he is estopped. He may be estopped, as between him and his lessors, from saying that he was not a bankrupt, but not as between him and the defendants. The mere surrender under the commission, and presenting a petition to the Lord Chancellor to enlarge the time for surrender, will not preclude a party from trying the validity of the commission in an action against the assignees, *Mercer v. Wise* (a). Then the question as to whether the bankrupt was a trader within the meaning of the bankrupt laws, is one juris positivi. The term brickmaker is not to be found in the 6 G. 4. c. 16., though it was in the former act of the 5 G. 4. The bankrupt's examination before the commissioners, shews the terms of the agreement by which he purchased the land of Colonel Olney. The 4s. per 1000 bricks was to be paid as part of the purchase-money, not as the price of the clay taken from the land. The plaintiff became, by virtue of the agreement, the equitable owner in fee of the land in question. Now *Parker v. Wells* (b), *Sutton v. Weeley* (c), and *Ex parte Burgess*, establish beyond all doubt, that the owner of the land in which there is a stratum of clay, who converts that clay into bricks for sale, is not therefore liable to the bankrupt

(a) 3 *Exp. N. P. C.* 216.(b) 1 *T. R.* 34.(c) 7 *East*, 442.

laws. And in a late case of *Paul v. Dowling* (a), where the owner of land in *Berkshire* burnt bricks from the clay contained in it, and bought chalk to burn with them, — that being a usual and convenient way of making bricks in that county, though not necessary for the particular clay, — and then sold the bricks, and the lime produced from the chalk, Lord *Tenterden* held that it did not make him a trader within the bankrupt laws, if his object in buying the chalk was the more convenient burning of the bricks, and not the profit derived from the sale of lime. The case of *Parker v. Barker* (b), establishes only that a declaration by a bankrupt that he is in partnership with another who is a trader, is *prima facie* evidence to go to a jury that the bankrupt was himself a trader, but not that it is conclusive evidence; and here the *prima facie* presumption arising from the fact of the bankrupt having been in partnership with two other persons who were traders, is rebutted by the other evidence in the cause.

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BAYLEY J. now delivered the judgment of the Court.

Upon the report in this case, two questions arise for our consideration, first, Whether the plaintiff was estopped from disputing the validity of the commission under which the defendant acted; and secondly, if he was not, whether the commission was valid.

The circumstances relied upon at the trial, and by the defendant's counsel in argument, as precluding the plaintiff from contesting his bankruptcy, were, first, his interference relative to the sale of his effects, for the

(a) *Moody & M.* 263.(b) 1 *Brod. & Bing.* 9.

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conversion of which by such sale, this action was brought; and, secondly, his having given notice to the landlords of a farm which he held (Messrs. *Wilkins*), describing himself as a brickmaker, dealer and chapman, and a bankrupt, and offering to give up his lease, which appears to have been afterwards accepted. The learned Judge thought on the trial, that the interference of the plaintiff in the sale was referable to an intention on his part, to take care of the property, and see that the most was made of it; and that it did not amount to a consent to the sale, and that he was not estopped on that ground: but he thought that as he had availed himself of the commission to derive a benefit from it, by the surrender of his lease, he was estopped by that act from saying that he was not a bankrupt; though he reserved the point for the consideration of the Court. In the former opinion we entirely concur, in the latter we are not able to acquiesce. There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him), and that transaction; but as to third persons he is not bound. It is a well established rule of law, that estoppels bind parties and privies, not strangers. (*Co. Lit.* 352 a. *Com. Dig.* *Estoppel* (C).) The offer of surrender made in this case, was to a stranger to this suit; and though the bankrupt may have been bound by his representation, that he was a bankrupt, and his acting as such, as between him and that stranger

stranger to whom that representation was made, and who acted upon it, he is not bound as between him and the defendant, who did not act on the faith of that representation at all. The bankrupt would probably not have been permitted, as against his landlords, — whom he had induced to accept the lease, without a formal surrender in writing, and to take possession upon the supposition that he was a bankrupt, and entitled under 6 G. 4. c. 16. s. 75. to give it up, — to say afterwards that he was not a bankrupt, and bring an action of trover for the lease, or an ejectment for the estate. To that extent he would have been bound, probably no further, and certainly not as to any other persons than those landlords. This appears to us to be the rule of law, and we are of opinion that the bankrupt was not by law, by his notice and offer to surrender, estopped, and indeed it would be a great hardship if he were precluded by such an act. It is admitted that his surrender to his commissioners is no estoppel, because it would be very perilous to a bankrupt to dispute it, and try its validity by refusing to do so (a). A similar observation, though not to the same extent, applies to this act; for whilst his commission disables him from carrying on his business, and deprives him, for the present, of the means of occupying his farm with advantage, it would be a great loss to the bankrupt to continue to do so; paying a rent and remaining liable to the covenants of the lease, and deriving no adequate benefit: and it cannot be expected that he should incur such a loss, in order to be enabled to dispute his commission with effect. It is reasonable that he should do the best for himself in the unfortunate situation in which he is placed.

(a) See *Flower v. Herbert*, 2 Ves. 326.

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It is not necessary to refer particularly to the cases in which a bankrupt has been precluded from disputing his commission, and which were cited in argument. The earlier cases fall within the principle above laid down. In *Clarke v. Clarke* (a), the bankrupt was not permitted to call that sale a conversion which he himself had procured and sanctioned: in *Like v. Howe* (b), he was precluded from contesting the title of persons to be assignees whom he by his conduct had procured to become so; and the last case on this subject, *Watson v. Wace* (c) is distinguishable from the present, because *Wace*, one of the defendants, was the person from whose suit the plaintiff had been discharged, and, therefore, perhaps he might be estopped with respect to that person by his conduct towards him.

The second question is, Whether the commission was invalid. The objection is, that the bankrupt was not a trader, and we are of opinion that he was not.

It appears from his own statement, that he purchased a piece of land near *Cheltenham*, five acres, for 2400*l.*, and that the land was intended for the making of bricks upon it, and no doubt; selling those bricks. He purchased in fee, and though he had no conveyance of the legal estate, he had a good equitable title, there being an agreement in writing, and he having been let into possession; and this places him on the same footing as if he had been owner in fee. It cannot be intended that he bought for the sole purpose of making bricks, for the price was much too large, though in our judgment that would make no difference. He then made and sold bricks, and the question is, Did this make him a trader?

(a) 6 *Exp.* 61.(b) 6 *Exp.* 20.(c) 5 *B. & C.* 153.

This is a question *juris positivi*, and depends entirely upon the construction of the bankrupt statutes. The first, 34 & 35 *Hen. 8. c. 4.* (which is referred to by Lord *Ellenborough* in *Sutton v. Weeley (a)*, as containing in its preamble the principle of the bankrupt laws,) recites "that divers persons craftily obtaining into their hands great substance of other men's goods, do suddenly fly to parts unknown or keep their houses, not minding to pay or restore to any of their creditors, their debts and duties, but at their own wills and pleasures consume their substance obtained by credit of other men." The second statute, 13 *Eliz. c. 7.*, in its provision as to persons liable to become bankrupts, differs but little from the 1 *Jac. 1. c. 15.* and 21 *Jac. 1. c. 19.* The last provides, that all persons that "use the trade of merchandize by way of bargaining, exchange, bartry, chevizance, or otherwise in gross or by retail, or seeking his, her, or their trade of living by buying and selling, upon committing acts of bankruptcy, shall be accounted and adjudged bankrupts." The buying and selling contemplated by this act, construing the words with reference to the context, and to the preamble of the first statute, is the buying and selling of goods; and in order to constitute such buying and selling, there must be a buying of goods and a selling of goods.

Under these acts of parliament, a series of cases ending with *Ex parte Gallimore (b)* established the rule, that if a person make bricks on his own estate, and sell them as a mode of enjoying the profits of real estate, he is no trader, and it makes no difference whether he is a freeholder or termor; if he uses this business to make a profit of the soil, which he has as his

(a) 7 *East*, 442.(b) 2 *Rose*, 424.

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own, whatever his interest in that soil be, he does not make profit, or in the language of the statute, "seek his living by buying and selling;" and, therefore, he is not liable to the bankrupt laws in that character. But where brick-making is carried on substantially and independently as a trade, he would be liable, that is, if a man buy the brick earth as a chattel, (and, perhaps, if he bought the brick earth only to be consumed by himself, it might be considered as the purchase of a chattel,) and purchasing the other necessary materials, sells the bricks made with that earth, he is a trader; for he is a person seeking his living by buying and selling goods. Under the old acts of parliament, therefore, the plaintiff would not have been a trader, nor is he under the new act of parliament, 6 G. 4. c. 16., as a person "seeking his living by buying and selling." But this statute has additional words, including those "who seek their living by the workmanship of goods or commodities;" but the case of *Ex parte Burgess* (a) has decided, that they do not include a person making bricks on his own estate; these words appear to have been introduced to meet the case of persons who do not buy and sell, and yet have other men's goods entrusted to them, (so as to bring them within the principle of the bankrupt laws,) such as bleachers and fullers, lace-makers, and stocking-makers, who make for others, and the like; but do not include those who use workmanship on goods, as a part of the profits of land, such as farmers making cheese or cider, alum-makers, &c.; and we concur with the judgment of the present Lord Chancellor in that case, and, therefore, are of opinion that the plaintiff was not a trader; and as he was not

(a) 2 Glyn & J. 183.

estopped from resisting this commission against him, the rule to enter a verdict for the plaintiff for 440l. must be made absolute.

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Rule absolute.

GREGORY against PIPER.

Chaudhry v. Broughton 1 C.M. 29
McLaughlin v. Ryan 4 Salk. 174 160

TRESPASS for casting, throwing, placing, and depositing divers large quantities of earth, stones, bricks, and rubbish against and upon the wall and gates and posts of the plaintiff. Plea, not guilty. At the trial before *Alexander C. B.*, at the Summer assizes for the county of *Cambridge* 1828, it appeared that the plaintiff occupied a public-house called the *Rising Sun*, in *Newmarket*, with a stable-yard belonging to it, where he put up the horses of his guests. The way to the stable was by the back gate from the *High Street*, through a yard called the *Old King's Yard*. A wall belonging to the plaintiff separated his stable-yard from the *Old King's Yard*. The defendant having purchased the property surrounding the *Old King's Yard*, disputed the plaintiff's right to pass along the same to his stable, and employed one *Stubbings*, a labourer, to lay down a quantity of rubbish, consisting of bricks, mortar, stones, and dirt, near the plaintiff's stable-yard, in order to obstruct the way; and *Stubbings*, on the 26th of *April*, and several following days, laid down rubbish accordingly, part of which rolled against the plaintiff's wall and gates. It lay about two feet high against the plaintiff's wall for five or six yards in length. *Stubbings* being called as a witness on the part of the plaintiff, stated

A master is liable in trespass for any act done by his servant in the course of executing his orders with ordinary care; and therefore, where a master ordered a servant to lay down a quantity of rubbish near his neighbour's wall, but so that it might not touch the same, and the servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran against the wall: Held, that the master was liable in trespass.

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stated that he was employed by the defendant to lay the rubbish in the yard; that the defendant had given him orders not to let any of the rubbish touch the plaintiff's wall; that he executed those orders as nearly as he could, and accordingly laid the rubbish at first at the distance of a yard and a half from the wall; and that the rubbish, being of a loose kind, as it became dry naturally shingled down towards and ran against the wall. He added that some of it would of course run against the wall. It further appeared that on the 3d of May, when an application was made by the plaintiff to the defendant to remove the rubbish, the latter said he was determined not to remove it. Upon this evidence it was objected by the defendant that trespass was not maintainable, inasmuch as the defendant had given express orders to the servant not to let the rubbish touch the plaintiff's wall; that, therefore, the touching of the wall was occasioned by the negligence of the defendant's servant, and that case, not trespass, was therefore maintainable.

The Lord Chief Baron directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained for that purpose, *Storks* Serjt. and *Kelly* were to have shewn cause against the rule, but the Court called upon

Denman and *Gunning* to support the rule. A master is liable in an action on the case only for the negligent conduct of his servant, and not at all for a wilful, unauthorized trespass committed by his servant, *Morley v. Gaisford* (a), *M'Manus v. Crickett* (b). And if a

(a) 2 H. Bl. 442.

(b) 1 East, 106.

servant,

servant; being ordered to do a lawful act, exceed his authority, and thereby commit an injury, the master is not liable. Here the master gave express directions to the servant to lay the rubbish so that it should not touch the wall of the plaintiff. [*Parke J.* The servant could not execute the orders of the master without some of the rubbish touching the wall; that was the necessary consequence of the act ordered to be done, and the person who gave the order must be taken to have contemplated the necessary consequence of his own act. The rolling of the rubbish against the wall was therefore as much the act of the defendant as if he had ordered it to be done.] The master is liable only for the inevitable consequences of the act. Here the servant by extraordinary care might have prevented the rubbish touching the plaintiff's wall. The Society of the *Inner Temple* have authorized the putting up of boards to obstruct windows opening upon their premises, but so as not to touch the wall of the premises in which the windows are. If a workman had wilfully knocked out a brick, that society would not have been liable. If the workman had done so through negligence they might have been liable in case, but not in trespass.

BAYLEY J. The only question is, Whether the trespass was the act of the master. The master desired the servant to lay down the rubbish so as not to let it touch or lean against the wall of the plaintiff. But if in execution of the order it was the necessary or natural consequence of the act ordered to be done that the rubbish should go against the wall, the master is answerable in trespass. The evidence shows that that was the natural consequence. The rule must, therefore, be discharged.

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LITTLEDALE J. Where a servant does work by order of his master, and the latter imposes a restriction in the course of executing his order which it is difficult for the servant to comply with, and the servant, in execution of the order, breaks through the restriction, the master is liable in trespass. Suppose the case of two persons possessed of contiguous uninclosed land, and that the one of them desired his servant to drive his cattle, but not to let them go upon the land of his neighbour, and that the cattle went upon the land of the neighbour, the master would be answerable in trespass, because he has only a right to expect from his servant ordinary, not extraordinary care. If the servant, therefore, in carrying into execution the orders of his master uses ordinary care, and an injury is done to another, the master is liable in trespass. If the injury arise from the want of ordinary care in the servant the master will only be liable in case. Here the servant used ordinary care in the course of executing the master's order, and, notwithstanding that, the rubbish ran against the wall.

PARKE J. I think that the defendant is liable in this form of action. If a single stone had been put against the wall it would have been sufficient. Independently of *Stubbings's* evidence there was sufficient evidence to satisfy the jury that the rubbish was placed there by the defendant, for he expressed his determination not to remove it. It does not rest there. *Stubbings* says he was desired not to let the rubbish touch the wall. But it appeared to be of a loose kind, and it was therefore probable that some of it naturally might run against the wall. *Stubbings* said that some of it of course would go against the wall. Now the defendant must be taken

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to have contemplated all the probable consequences of the act which he had ordered to be done, and one of these probable consequences was, that the rubbish would touch the plaintiff's wall. If that was so, then the laying the rubbish against the wall was as much the defendant's act as if it had been done by his express command. The defendant, therefore, was the person who caused the act to be done, and for the necessary or natural consequence of his own act he is responsible as a trespasser.

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Rule discharged.

MANN *against* OWEN and Others.

DECLARATION for assault and false imprisonment.

Plea, not guilty. Secondly, that the plaintiff was a person in and belonging to the Fleet of our lord the king, in actual service and full pay in the said Fleet, viz. an officer in and of his said majesty's naval service, to wit, a purser in his said majesty's naval service; and as such officer and purser was employed in his majesty's naval service as purser of a certain ship of war of his said majesty, to wit, the ship *Perseus*; and that the plaintiff being such officer and purser in such actual service and full pay as aforesaid, and so employed as aforesaid, before the said time when, &c. to wit, on the day and year aforesaid, on board the said ship *Perseus*, the same then being within the jurisdiction of the admiralty of *England*, to wit, in the river *Thames*, committed and was guilty of a certain offence and breach of his duty as such officer and purser, cognizable by a

A purser in the navy is liable, by the 22 G. 2. c. 33., to be tried by a court-martial for fraudulently and unlawfully charging blankets against seamen to whom none had been issued, and of making, in order to such charge, certain false entries in one of the ship's books, that being, within the thirty-sixth article of war, "an offence not capital committed by a person in the Fleet not before mentioned in the act, and for which no punishment is thereby directed to be inflicted."

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naval court-martial, to wit, *of fraudulently and unlawfully charging twenty-six blankets against twenty-six supernumerary seamen, to whom none had been issued; and of making, in order to such fraudulent charge, certain false entries in a certain book of the said ship Perseus.* The plea then states, complaint duly made to the lords commissioners of the admiralty within three years after the committing of the said offence; their lordships' order duly issued to assemble a court-martial, the defendant *Owen* being president; the due summoning and assembling of the same; that the defendants with others, duly held the same for the purpose of trying the plaintiff on board the *Prince Regent*, in the port of *Chatham*; that the said court did duly try him for the said offence, and having weighed and considered the evidence produced against the plaintiff, his statement and evidence in his defence, the court was of opinion that the offence had been proved against the plaintiff, and in consequence thereof did adjudge him to be dismissed from his majesty's service, and rendered incapable of ever serving as a purser in the navy of his majesty, his heirs and successors: that the defendants with the other members of the court-martial, did within the admiralty jurisdiction, to wit, in the said port, on board the said ship, cause the plaintiff to be taken into custody without any unnecessary violence, and detained on board the said ship during his trial, for the purpose of such trial, as they lawfully might for the cause aforesaid, &c. The Plaintiff joined issue on the first plea, and to the other plea replied *de injuriâ*, upon which issue was joined. At the trial before Lord *Tenterden* C. J. at the *London* sittings after *Trinity* term 1827, the facts stated in the second plea, except the fact that the plaintiff had committed

mitted the offence for which he was charged, were proved or admitted; and it was also proved to be the invariable practice, in all naval courts martial, for the party accused to be in-custody during the trial. A verdict was found for the plaintiff on the general issue; and for the defendants, on the issue joined on the special plea. A rule nisi for entering judgment for the plaintiff, notwithstanding the verdict, having been obtained; when the same came on to be heard, the points in question were, at the suggestion of the Court, made the subject-matter of a special case. The naval article of war, viz. the thirty-sixth, mentioned in the statute of 22 G. 2. c. 35., and upon which the defendants principally relied, is as follows: "All other crimes, not capital, committed by any person or persons in the fleet which are not mentioned in this act, or for which no punishment is hereby directed to be inflicted, shall be punished according to the laws and customs in such cases used at sea."

Barnewall for the plaintiff. The defendants had no jurisdiction to try, by court-martial, a purser for the offence stated in the second plea. That offence was, that he had fraudulently and unlawfully charged twenty-six blankets against twenty-six supernumerary seamen to whom none had been issued, and that he had made, in order to such fraudulent charge, certain false entries in a certain book of the ship *Perseus*." The offence charged, amounts in substance to an attempt by the plaintiff to obtain an allowance of a certain sum per blanket, by a false representation that he had issued a certain number of blankets to the seamen. That would, undoubtedly, be an indictable misdemeanor at common law; but it must depend wholly on the naval articles of war contained in

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the statute 22 G. 2. c. 33., whether a purser be liable to be tried by a court-martial for such a misdemeanor. Many offences described in those articles are breaches of duties attaching on individuals as members of the naval profession; such as disobedience of orders, &c. The offence imputed to the plaintiff is not embezzlement within the twenty-fourth article. At most, it is no more than an attempt to obtain money by false pretences. Nor is it within the thirty-first article, which applies to the signing a false muster-book. The thirty-third article does not apply to a purser, but the offence charged against the plaintiff is there described. The words of that article are, "if any flag-officer, captain, or commander, or lieutenant belonging to the fleet, shall be convicted before a court-martial of behaving in a scandalous, infamous, cruel, oppressive, or *fraudulent* manner, unbecoming the character of an officer, he shall be dismissed from his majesty's service." Now, here the offence imputed to the plaintiff was that of behaving in a fraudulent manner; but he, not being a flag-officer, captain, commander, or lieutenant, is not within that article: though it is quite clear, from the punishment inflicted on him, that the court-martial thought he was. It will be said he is within the thirty-sixth article. Now, to render him liable to be tried by a court-martial under that article, he must first have been guilty of a crime. That term, in its strictest sense, imports an offence of a higher description than a misdemeanor. Offences in our law books are generally divided into felonies and misdemeanors, or crimes and misdemeanors. Though the word crime may, in some instances, be used to comprehend all offences, yet, in its strictest sense, it is used to distinguish felonies from

from misdemeanors; and it ought, in a highly penal statute, to be confined to offences of the former description. But the thirty-sixth article contains the additional words, "not capital." An inference thence arises, that the legislature understood the word *crime* to relate to capital offences, and therefore studiously added the other words to shew that it had another meaning. Assuming that the word *crime* comprehends every offence, that article applies to offences not before mentioned in the act, and for which no punishment is thereby directed to be inflicted. Now, the offence imputed to the plaintiff is mentioned in the thirty-third article, and a punishment directed to be inflicted for it; it is comprehended within the words "behaving in a fraudulent manner:" it is not, therefore, an offence included in the thirty-sixth article.

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Maule, contra, was stopped by the Court.

BAYLEY J. It has been properly conceded, that this plea states that the plaintiff was charged with an offence which, at common law, would be an indictable misdemeanor; and the question is, whether the thirty-sixth article of war applies to such a misdemeanor. The words are, "all other crimes, not capital." Now, clergy did not apply to offences committed within the admiralty jurisdiction; and, therefore, if there be in strictness any distinction between crimes and misdemeanors, the words "all other crimes, not capital," may be confined wholly and exclusively to misdemeanors. The word *crime*, however, is a general term, and the subdivision of it is into felonies and misdemeanors. Mr. Justice *Blackstone*, in his *Commentaries*, says, "We

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are now arrived at the fourth and last branch of these Commentaries, which treats of public wrongs, or crimes and misdemeanors." He there uses both terms. He afterwards says, "We are now to proceed to the consideration of public wrongs, or crimes and misdemeanors, with the means of their prevention and punishment. In the pursuit of which subject, I shall consider, in the first place, the general nature of crimes and punishments; secondly, the persons capable of committing crimes; thirdly, their several degrees of guilt, as principals or accessories; fourthly, the several species of crimes, with the punishment annexed to each by the laws of *England*; fifthly, the means of preventing their perpetration; and, sixthly, the method of inflicting those punishments which the law has annexed to each several crime and misdemeanor." And afterwards, crimes are not treated of as contradistinguished from misdemeanors, but crimes and misdemeanors are treated of under the general denomination of crimes. It would have been an illogical distribution of the subject, to have treated of crimes and misdemeanors as relating to two distinct classes of subjects, and therefore to begin with treating of crimes, and omit misdemeanors. But then, it is said that this article relates only to misdemeanors which *are not mentioned in the act*, or for which no punishment is directed to be inflicted. And that this is a crime mentioned in the act, because the thirty-third article says, that any such person as is therein mentioned behaving in a fraudulent manner unbecoming the character of an officer, shall be dismissed from his majesty's service. That article applies only to frauds committed by persons of a particular character, and is silent as to frauds committed by persons
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in a lower station. The offence, therefore, with reference to a purser, of making a false entry with a view to a fraud, is not mentioned in the former articles. The thirty-third article only applies to that species of misconduct committed by persons of a particular description. The consequence of holding that the words, "which are not mentioned in this act," excludes from the thirty-sixth article every thing which amounts to scandalous or fraudulent conduct, would be to prevent the punishment of every common sailor for a misdemeanor of that description. I think that never could have been the meaning of the legislature, when they used those words. I am inclined to think, though it is not necessary to decide that point, that the words "which are not mentioned in this act," are explained by the words which immediately follow: "or for which no punishment is hereby directed to be inflicted." Now, it is quite clear that, with reference to this case, no punishment was directed to be inflicted by the act. Without pronouncing any decision on that point, I am of opinion, for the reasons already given, that the plea is good, and that the judgment ought to be entered for the defendant, and that the present rule ought, therefore, to be discharged.

LITLEDALE J. I am of the same opinion. The offence stated in the plea is not one coming within the twenty-first, twenty-fourth, or thirty-third article of war. The question is, whether it is within the thirty-sixth article. Now, as to the argument that the word "crime" denotes something more than misdemeanor, it seems to me that the word "crime" in that article has the same meaning as "offence." A man may, indeed, be guilty of

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an offence for which the law does not award any punishment. The proper definition of the word "crime" is an offence for which the law awards punishment. Such crimes are subdivided into three classes — treasons, felonies, and misdemeanors. Then, it is said, admitting this to be an indictable offence at common law, it comes within the words of the thirty-third article, "behaving in a fraudulent manner;" and, therefore, that it is a crime mentioned in that article, and, consequently, not included in the thirty-sixth article, which applies to all other crimes not before mentioned in the act; and, therefore, that a person holding the situation of a purser is not liable to be tried by a court-martial for such conduct. It seems to me that the thirty-third article does not apply to this description of case, even with regard to a flag-officer; that it was intended to apply to conduct unbecoming the character of an officer, and not to crimes. It does not award any particular punishment, but merely that the party shall be dismissed from the service. A man may behave in a scandalous, oppressive, cruel, or fraudulent manner, and yet may not be punishable by the common law. I think, therefore, that this was not a case within the meaning of the thirty-third article, but that it was a crime which had not been mentioned in the act before; and as it was committed by a purser in the fleet, I think it was cognizable by a court-martial under the thirty-sixth article of war.

PARKE J. The offence imputed to the plaintiff, which is admitted to have been an indictable misdemeanor, is a crime "*not capital*" within the meaning of those terms in the thirty-sixth article. I think, also, it was a crime not previously mentioned in the act. The
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thirty-third article applies to offences not of a criminal character which would render a man liable to an indictment, but to conduct unbecoming the character of an officer; but whether the offence be or be not before mentioned in that act, that article applies only to a captain, commander, or lieutenant, and not to a purser; and, therefore, it appears to me, on both grounds, to be an offence not embraced by the thirty-third article; and being an offence not capital, it is within the thirty-sixth article, and punishable by a court-martial; and if so, the plea is good.

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Judgment for the defendants.

HARDY *against* RYLE, Esq.

TRESPASS and false imprisonment. Plea, the general issue. At the trial before *Jervis J.* at the *Chester* Summer assizes 1828, it appeared that the plaintiff, a silk weaver, had been committed to gaol by the defendant, a magistrate of the county, for one month. The plaintiff was discharged out of custody on the 14th of *December*, and the writ against the defendant was issued on the 14th of *June*, after due notice. The commitment was directed to all constables, &c. and the keeper of the house of correction at *Knutsford*; and was as follows:—

“Whereas information and complaint hath been made before me *John Ryle*, Esquire, one of his majesty’s

to weave certain goods, as stated in the commitment, was not contracting to serve within the meaning of the 4 G. 4. c. 34., and that the justice had acted without authority.

In trespass against him for false imprisonment, it appeared that *A. B.* was discharged from prison on the 14th of *December*, and the writ issued on the 14th of *June*: Held, that the action was commenced in time.

Where a commitment under the 4 G. 4. c. 34. s. 3. recited that *A. B.* had contracted to weave certain pieces of silk goods for *C. D.* at certain prices agreed upon between them, and had neglected his work after entering upon his said service, wherefore the justice convicted him, and committed him for one month: Held, that contracting

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justices of the peace in and for the said county, by *Thomas Hall* of *Macclesfield*, in the said county, silk manufacturer, upon the oath of the said *Thomas Hall*, against *Henry Hardy* of *Macclesfield* aforesaid, silk weaver, that he the said *Henry Hardy* did contract and agree with him the said *Thomas Hall*, to weave certain pieces of silk goods at certain prices fixed upon between the said *Thomas Hall* and *Henry Hardy*, at his the said *Henry Hardy's* house in *Macclesfield* aforesaid, and that he the said *Henry Hardy* had neglected to fulfil the contract so entered into between them, although he had commenced upon the said work under such contract. And whereas, in pursuance of the statutes in that case made and provided, I have duly examined the proofs and allegations of both the said parties touching the matter of the said complaint, and upon due consideration had thereof, have adjudged and determined that the said *Henry Hardy* hath in his said service been guilty of certain misconduct and ill behaviour towards the said *Thomas Hall*, in that he the said *Henry Hardy*, having contracted with him the said *Thomas Hall* to weave certain pieces of silk goods at certain prices fixed upon between the said *Thomas Hall* and *Henry Hardy*, at his the said *Henry Hardy's* house in *Macclesfield* aforesaid, hath neglected to fulfil the contract so entered into between them, although he hath commenced upon the said work under such contract, and hath neglected his work without the leave or consent of the said *Thomas Hall*; and I do therefore convict him the said *Henry Hardy* of the said offence, in pursuance of the statute in that case made and provided. These are therefore to command you the said constables and special constables forthwith to convey the said *Henry Hardy* to the said house

house of correction at *Knutsford* aforesaid, and deliver him to the keeper thereof, together with this warrant. And I do hereby command you the said keeper to receive the said *Henry Hardy* into your custody in the said house of correction, there to remain and be held to hard labour for the space of one month from the date hereof."

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For the defendant, a conviction, upon which the commitment was founded, was given in evidence. And it was contended, first, that the commencement of the action was too late; and secondly, that under the 4 G. 4. c. 34. s. 3. the defendant had power to convict and to commit the plaintiff for the offence specified in the conviction, and that the commitment was according to the conviction. For the plaintiff it was said, that as the imprisonment continued during a part of the 14th of *December*, that day was to be excluded from the calculation of the six months, and, therefore, the action was commenced in time; and that the conviction did not shew that the plaintiff had been guilty of any offence against the 4 G. 4. c. 34. s. 3. The learned judge desired the jury to say what damages the plaintiff was entitled to, and they found one farthing. He then directed a nonsuit, giving the plaintiff leave to move to have a verdict entered in his favour. In *Michaelmas* term, a rule nisi for that purpose was granted, and at the sittings in Banc, after last *Hilary* term,

Cross Serjt. and *J. Jervis* shewed cause, and contended, first, that the action was not commenced in time, and that the statute 24 G. 2. c. 44. s. 8. being for the protection of justices, the day on which the imprisonment ended

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ended was to be included in the calculation of the six months, and for this they cited *Rex v. Adderley* (a), *Castle v. Burditt* (b), *Glassington v. Rawlins* (c). And they distinguished the cases of *Thomas v. Popham* (d), *Watson v. Pears* (e), and *Ex parte Fallon* (g), on the ground that in those cases the day was excluded, in order to effectuate the act intended by the parties, and to prevent the divesting of a right; and the cases of *Lester v. Garland* (h), and *Pellew v. The Hundred of Wonford* (i), on the ground, that in them the party to be affected was not privy to the act from which the calculation was to be made.

J. Williams and *Wightman* contra, contended that the reasoning of the Master of the Rolls in *Lester v. Garland* was conclusive in favour of the plaintiff: — “Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of indivisible point, so that any act done in the compass of it is no more referable to any one than to any other portion of it, but the act and the day are co-extensive; and, therefore, the act cannot be said to be past till the day is past.” If so, the act of imprisoning the plaintiff, which clearly existed during a part of the 14th of *December*, in contemplation of law cannot be said to have ceased until the day ceased. This case was much considered, and eventually acted on in the recent decision of *Pellew v. The Hundred of Wonford* (i).

(a) *Doug.* 463.(c) 3 *East*, 407.(e) 2 *Campb.* 294.(h) 15 *Ves.* 248.(b) 3 *T. R.* 623.(d) *Dyer*, 218.(g) 5 *T. R.* 283.(i) 9 *B. & C.* 134.

The Court said they would consider this point before they heard any argument on the other; and in the course of the same sittings their opinion as to this point was delivered by

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BAYLEY J. This was an action against a magistrate for false imprisonment, and the question upon which we are now to pronounce our opinion turns entirely on the computation of time. It appears that the plaintiff was committed to prison by the defendant for one calendar month, and that he was discharged from that imprisonment on the 14th of *December*. The writ in the present action was sued out on the 14th of *June*. Assuming that that imprisonment was illegal, the question is, whether the action was commenced within six calendar months after the *act* committed, as required by the 24 G. 2. c. 44. s. 8.; and that depends upon this, whether the 14th day of *December*, the last day of the plaintiff's imprisonment, is to be included or excluded in computing the six months. If it is to be included, the action was not commenced in time; if it is to be excluded, it was. The 24 G. 2. c. 44. s. 8. enacts, "that no action shall be brought against any justice of the peace for any thing done in the execution of his office, unless commenced within six calendar months after the *act* committed;" and the same construction is to be put upon the words of this section, whether the act committed be an imprisonment of the person or a seizure of goods. If, therefore, in case of a seizure of the goods of the plaintiff on the 14th day of *December* under a warrant granted by the defendant, that day would have been excluded in computing six months, it must be equally excluded in the present case. The question whether, in computing time from an act or event, the day

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day is to be included or excluded, came under the consideration of Sir *W. Grant* in *Lester v. Garland (a)*. All the authorities on the subject are reviewed by Sir *W. Grant*, who takes this distinction: that where the act done from which the computation is made, is one to which the party against whom the time runs is privy, the day of the act done may reasonably be included; but where it is one to which he is a stranger, it ought to be excluded. He points out this as a distinction which will reconcile many of the cases. He observes that in the case of a notice of action to be brought, the party necessarily knows the time at which he is served with the notice, and may immediately begin to consider of the propriety of preventing the action by tendering amends. So a person arrested may immediately set about endeavouring to procure bail; and the same observation applies to the case of a man robbed, and of continual claim. Now, in this case the action is brought for false imprisonment, and every continuance of the imprisonment is in point of law a new imprisonment, and therefore the plaintiff may be considered to have been imprisoned by the defendant on the 14th day of *December*; and the words of the 22 G. 2. c. 44. s. 8. must receive the same construction in the case of an imprisonment, as they would in the case of a seizure of the plaintiff's goods under a magistrate's warrant. It is quite clear, according to the rule laid down by Sir *W. Grant*, that in case of a seizure of the plaintiff's goods under the authority of a warrant granted by the defendant, that being an act to which the plaintiff is not privy, the day of the seizure would be excluded in

(a) 15 Ves. 247.

computing the six months. In *Lester v. Garland* (a), there was a bequest of a residue in trust, in case *A.* should, within six months after the testator's decease, give security not to marry a particular person, and then to pay to the children of *A.* There, upon the principle I have already adverted to, the day from which the computation was to take place, was held to be excluded. In *Pellev v. The Inhabitants of the Hundred of Wonsford* (b), the action was brought to recover damages for an injury done to premises maliciously set on fire. The 9 G. 1. c. 22. required notice to be given within two days after the injury done. The fire happened on *Saturday*, the notice was given on the *Monday* following; and this Court, acting upon the rule laid down by Sir *W. Grant*, held, that the day of the happening of the event, from which the computation of time was to run, was to be excluded. Upon the same principle in this case, my Brother *Littleton* and I are of opinion that the 14th day of *December* ought to be excluded in computing the six months, and consequently the present action was commenced in due time. My Brother *Parke*, having been concerned in the cause when at the bar, has taken no part in this decision.

Cross Serjt. and *J. Jervis* now shewed cause as to the second point. The only question remaining to be considered is, whether the magistrate had jurisdiction under the 4 G. 4. c. 34. s. 3. and whether he has proceeded rightly to exercise that jurisdiction? The words, "handicraftsman or other person," are abundantly large enough to include the case of a silk weaver; and the

(a) 15 Ves. 347.

(b) 9 B. & C. 134.

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latter part of the section clearly applies to persons having entered into their service, whether any contract in writing was made or not. But it is contended, that as silk weavers are not mentioned expressly in this act, and as there are several older acts containing provisions as to them, the modern act is inapplicable. The declared intention of the legislature, however, was to enlarge the power of justices, and they have used terms sufficient to include silk weavers, and not repugnant to the former statutes; there is not, therefore, any reason for contending that the magistrate had not power to proceed under the 4 G. 4. c. 34. Then, as to the commitment, it states that a complaint was made on oath, that the plaintiff had contracted and agreed to do certain work, and that he had neglected to fulfil the contract, although he had commenced upon the work under the contract. And then the magistrate adjudges that he had been guilty of misconduct in his said service, in that he, having made such contract, had neglected to fulfil it, although he had commenced upon the said work under the contract. A commitment is not to be construed so strictly as a conviction, *Rex v. Helps*(a), and this is sufficiently good.

J. Williams and *Wightman* contra. It must be admitted that the language of the 4 G. 4. c. 34. s. 3., if standing by itself, is sufficiently comprehensive to apply to silk weavers. But as there is a former act expressly regulating them, it cannot be supposed that the new statute, in which they are not named, gives any jurisdiction over them. The 17 G. 3. c. 56. does in terms apply

(a) 3 M. & S. 331.

to silk weavers; and by the eighteenth section the magistrate has no authority to punish the workman unless he has neglected his work for eight days. But whatever be the effect of the 4 G. 4. c. 34. s. 3. as to this matter, it is clear that the plaintiff is not within its operation. Clearly it applies only to contracts *of service*; and a person cannot be said to become the servant of another, unless he enters into his service exclusively. Here the plaintiff made no such contract: he might, notwithstanding his engagement with the complainant, have made contracts for weaving with various other persons. If a servant, he might commit larceny of the goods entrusted to him; but clearly the plaintiff could not commit a larceny of the silk which was delivered to him to be carried home for weaving at his own house.

BAYLEY J. It is not necessary to decide whether the 4 G. 4. c. 34. does or does not apply to the silk trade; but it may be observed, that before it passed there were statutes expressly applicable to it. The statutes 20 G. 2. c. 19. and 6 G. 3. c. 25. had also been passed, applying to the same persons as are enumerated in the 4 G. 4. c. 34. s. 3.; and the latter statute, which recites the other two, was made to extend the powers of the said acts. But let us see whether the terms of the conviction and commitment bring the present case within the 4 G. 4. c. 34. s. 3., which enacts, "that if any servant in husbandry, &c. or other person, shall contract with any person or persons whomsoever to serve him, her, or them, &c." To be within the act, the party must not only be included in the enumeration of persons to be affected by it, but must also have "contracted to serve." Now there is a very plain distinction between becoming the servant of an indl-

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 HARDY
 against
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individual, and contracting to do certain specific work. The same person may contract to do work for many others, and cannot, with any propriety, be said to have contracted to serve each of them. If that be so, the conviction and commitment are bad; for they do not shew that the plaintiff contracted to serve, but to weave certain goods. The terms of the contract as to time and wages are not stated; they, therefore, cannot supply any defect. Upon the whole, I think it clear that the case has not been brought within the 4 G. 4. c. 34. s. 3. and therefore the rule for entering a verdict for the plaintiff must be made absolute.

LITLEDALE J. I am entirely of the same opinion. This commitment does not bring the case within the 4 G. 4. c. 34 s. 3. That requires either actual service or a contract for service. Here there was neither. The 17 G. 3. c. 56. does not apply, for the party was not punished for neglecting his work for eight days. The magistrate has, therefore, failed in shewing that he had jurisdiction, and the plaintiff is entitled to a verdict.

PARKE J., having been, when at the bar, counsel in the cause, gave no opinion.

Rule absolute.

1829.

In Breadbent v. Shaw 2 B. Add. 96

Cross against JOHNSON and Others.

TRESPASS, *quare clausum fregit*. The declaration stated, that the defendants broke and entered a close of the plaintiff, and spoiled divers, to wit, five gates, and spoiled the grass, &c. and broke down hedges and destroyed trees, and filled up a fish-pond, and broke to pieces an outhouse. The defendants pleaded first, not guilty to the whole declaration; secondly, a right of common for all cattle over the locus in quo, by the custom of the manor of *Cherterton* in respect of a customary messuage; thirdly, a right of way. The plaintiff, in his replication, took issue on the plea of not guilty, and traversed the right of common and right of way pleaded in the second and third pleas; and newly assigned to the second and third pleas that the defendants, on other occasions, and for different purposes than those in the special pleas mentioned, and to a greater degree, and to a greater extent, and with more force and violence than was necessary, committed the trespasses in those pleas mentioned; and that the defendants committed the trespasses complained of in other parts of the close out of the way in the third plea mentioned. The defendant, by his rejoinder, took issue upon the traverse of the right of common and of the right of way; and he withdrew his plea of not guilty so far as related to the trespasses newly assigned, and suffered judgment by default to the new assignment, To trespass, *quare clausum fregit*, defendant pleaded, first, not guilty; secondly, a right of common; thirdly, a right of way. The plaintiff took issue on the plea of not guilty, and traversed the rights of common and of way; and newly assigned to the second and third pleas, that the defendant, on other occasions, and for other purposes than those mentioned in the special pleas, committed the trespasses complained of. Defendant in his rejoinder took issue upon the traverse of the right of common and right of way; and withdrew the plea of not guilty, so far as it related to the trespasses newly assigned, and suffered judgment by default to the new assignment. At the trial, the issue on one of the special pleas was found for the defendant, and the jury assessed the plaintiff's damages on the new assignment at 5*l*. : Held, that the defendant was entitled to the costs of the trial.

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CROSS
against
JOHNSON.

cause the plea of justification went to all the trespasses on the first part of the case. It seems to me that upon a declaration so framed, the plaintiff might have recovered all the damages sustained by him, and that the defendant would have been entitled to the costs of the trial. I never saw a declaration so framed. I only assimilate a new assignment to it. *Thornton v. Williamson* (a) is very like this case.

PARKE J. The *postea* must be looked to in order to determine whether the defendant be entitled to the costs of the trial. It appears by the *postea* that all the issues (which the jury were called upon to try) were found in favour of the defendant. Any one issue going to the whole cause of action would entitle a party to the whole costs. The defendant, therefore, is entitled to judgment on the whole record. He is, therefore, entitled to the costs of the trial.

Rule refused (b).

The Master upon taxation allowed the defendant the costs of the issues, and the plaintiff the costs of executing a writ of enquiry.

(a) 13 *East*, 191.

(b) This case was decided at the sittings in bank after *Hilary* term, but was unavoidably omitted in its proper place. The motion was made late in that term, and the Court ordered it to be heard at the sittings.

END OF EASTER TERM.

C A S E S

ARGUED AND DETERMINED

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IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Tenth Year of the Reign of GEORGE IV.

MEMORANDA.

In the course of the last vacation, Sir *W. Draper Best* resigned the office of Chief Justice of the Court of Common Pleas, and was created Baron *Wynford*; he was succeeded by Sir *Nicholas Conyngham Tindal*, Knight, who was called to the degree of Serjeant, and gave rings with the motto, "Quid leges sine moribus?" and took his seat on the first day of this term.

Sir *Charles Wetherell*, His Majesty's Attorney-General, resigned his office, and was succeeded by Sir *James Scarlett*, Knight.

Edward Burtenshaw Sugden, Esquire, was appointed His Majesty's Solicitor General in the room of Sir *N. C. Tindal*; and was knighted.

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*Garnard v. C. Hall. 10. 2 B 677**Friday,
June 19th.*DAWSON *against* MORGAN, Gent., one, &c.

An indorser of a bill of exchange having had an action brought against him by the indorsee, is not entitled to recover from the acceptor the costs incurred in such action.

DECLARATION on a bill of exchange dated the 3d of November 1824 for 40*l.* 8*s.* 6*d.*, drawn by *W. J. Bantocks* upon the defendant, payable three months after date to the order of the drawer; indorsed by the latter to the plaintiff, and by him to one *J. Florance*. The declaration stated the presentment of the bill for payment, and refusal, and notice thereof to the plaintiff; that an action was commenced by *Florance* against the plaintiff in K. B., and judgment given for 54*l.* 10*s.*, damages and costs; that for the recovery of those damages and costs, *Florance* sued out a writ of *fi. fa.* against the plaintiff's goods; that the plaintiff, in order to obtain the release of his goods, was forced to pay the sum of 54*l.* 10*s.*, 1*l.* 5*s.* for the writ, and 4*l.* 9*s.* for sheriff's poundage and expenses, amounting in the whole to 60*l.* 4*s.*, of all which premises the defendant had notice; that according to the usage of merchants, the defendant became liable to pay to the plaintiff the said sum of 60*l.* 4*s.*; and that being so liable, he promised to pay the plaintiff that sum. Plea, general issue. At the trial before Lord Tenterden C. J., at the London sittings after Easter term 1829, the acceptance, indorsement, and presentment of the bill were proved, and that *Florance* had brought an action against the plaintiff, and in Easter term 1825 had recovered judgment against him for 54*l.* 10*s.*; that a *fi. facias* issued against the plaintiff; that he paid the sheriff the debt, 1*l.* 5*s.* for the writ, and 4*l.* 9*s.* for poundage, making altogether 60*l.* 4*s.*; and

and having received subsequently the amount of the bill from *Flurance*, who had obtained judgment against the acceptor, the present action was brought to recover 20*l.* 0*s.* 6*d.* Upon these facts, Lord *Tenterden* was of opinion that, although it was the practice of the Court to make the acceptor pay the costs of all parties when he applied to stay proceedings against himself in an action on a bill of exchange; yet, that it was a matter of discretion in the Court, which was exercised upon the ground that the acceptor was asking a favour, which the Court would not grant unless he would do justice by consenting to pay the costs of all parties incurred by his original default; and he observed, that it would be a hard case upon an acceptor, where several actions have been brought upon a bill, if he were liable to the costs of them all. The plaintiff was nonsuited, with liberty to move to enter a verdict for 20*l.* 0*s.* 6*d.*

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 DAWSON
against
MORGAN.

Patteson now moved accordingly. The indorser, having been sued by the indorsee in consequence of non-payment of this bill by the acceptor, is entitled to recover from the latter the costs incurred in the action brought against him by the indorsee. In *Smith v. Dudley* (a) the holder of a bill brought actions against the acceptor, the drawer, and two indorsers; the drawer and one of the indorsers obtained a rule nisi to stay the proceedings against them on payment of the bill and costs of the actions against them. The plaintiff insisted that the costs of the other actions should be also paid. But it was held, that that was only necessary where the application came from the acceptor, who is the original

(a) 4 T. R. 691.

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DAWSON
against
MORGAN.

defaulter, and against whom all the costs occasioned by his default may be recovered. In *Jones v. Brookes* (a) the action was brought against the acceptor. The drawer's wife was called as a witness for the defendant, to prove that the drawer indorsed away the bill upon an usurious consideration. The witness was objected to, but admitted; but on rule nisi, cause shewn, and time taken to consider, the Court held the drawer had a direct interest to defeat the action, because otherwise he must indemnify the defendant against the costs as well as pay him the amount of the bill, and that the wife, therefore, was incompetent. [*Bayley J.* There the bill was accepted for the accommodation of the drawer. There was a bargain between the parties that the drawer of the bill should indemnify the acceptor. No case goes the length of saying, that every person who is sued upon a bill is entitled to recover against the acceptor the costs incurred in the suit.] In *Pownal v. Ferrand* (b), it appeared that the plaintiff, an indorsee, having been sued by the holder, paid 40*l.*, part of the bill. The holder also sued the acceptor, and recovered the residue. It was held, that the plaintiff might sue the defendant, the acceptor, for the 40*l.* as money paid to his use. [*Bayley J.* There the plaintiff recovered only the 40*l.*, but not costs.] There was not in that case any special count.

Lord TENTERDEN C. J. What privity of contract is there between an indorser and an acceptor? What obligation is there on the acceptor, except that raised by the custom of merchants? That custom does not even give a right to an indorser to recover re-exchange,

(a) 4 *Taunt.* 464.(b) 6 *B. & C.* 459.

much

much less costs incurred by him in an action on the bill.

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against
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BAYLEY J. In an Anonymous case in *Hardres*, 485., it was held that debt would not lie by the payee against the acceptor of a bill of exchange, because there was no privity between them, and because the acceptance was a collateral undertaking only.

Rule refused.

LORD *against* HILLIARD.

Friday,
June 19th.

IN this case the plaintiff, an attorney, issued an attachment of privilege against the defendant returnable in *Michaelmas* term 1826, and in the same term a declaration was delivered, common bail filed, and the general issue pleaded. On the 9th of *December* 1826, a copy of a rule to reply was served on the plaintiff, and he replied within the time limited by that rule. No further proceedings were taken until the 23d day of *February* 1829, when a copy of a rule to enter the issue was served upon the plaintiff: the plaintiff did not comply with that rule. The defendant, on the 2d of *May*, signed judgment of non pros. for not entering the issue, and sued out execution. A rule nisi having been obtained for setting aside the judgment and execution issued thereon for irregularity, with costs, on the ground that more than four terms having elapsed, defendant was bound to have given a term's notice before he served the rule to enter the issue,

Where four terms have elapsed without any proceeding having been taken in a cause, the defendant cannot rule the plaintiff to enter the issue without giving a term's notice of his intention to proceed in the cause.

Kelly

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 LORD
 against
 HILLIARD.

Kelly now shewed cause. The defendant was not bound by the practice of the Court to give a term's notice before he served the rule for entering the issue. In *Theobald v. Crickmore* (a) it was held, that it was not necessary, in case of trial by proviso, after a lapse of four terms without any proceeding, to give a term's notice, it having been previously decided that a term's notice was not requisite before moving for judgment as in case of a nonsuit; that practice being substituted for trial by proviso. In *May v. Wooding* (b) Lord *Ellenborough* assigns the reason of the rule to be, "that while the matter is still in controversy, the party should, after so long a lapse of time as four terms without any proceedings, have notice, that he may prepare himself; but when the matter has passed in rem judicatam by the verdict, the reason does not apply." Here the matter had not passed in rem judicatam, at the time when the rule to enter the issue was served, but the pleadings were concluded, and the point to be tried was no longer in controversy.

Helps contra. The defendant ought to have given a term's notice before he gave the rule to enter the issue. The rule to enter the issue is an interlocutory stage in the cause, and the rule requiring a term's notice is stated by Lord *Ellenborough* in *May v. Wooding* to apply only to interlocutory stages of the cause. [*Bayley* J. Judgment as in case of a nonsuit is founded on the 14 G. 2. c. 17. The rule requiring a term's notice after a lapse of four terms in the Common Pleas was made in the 13 G. 2. Now,

(a) 2 B. & A. 594.

(b) 3 M. & S. 500.

the

the case of *Doe v. Moses* (a), in which it was held in this Court that the requiring a term's notice of proceeding did not extend to a motion for judgment as in case of a nonsuit, was founded upon *Manby v. Wortley* (b), which was decided in the Common Pleas in the 19 G. 3., and proceeded upon the ground that the rule of the 13 G. 2. did not extend to motions for judgment as in case of a nonsuit, because the rule was made previous to that statute.]

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against
HILLIARD.

LORD TENTERDEN C. J. The case of *Manby v. Wortley*, in which the rule requiring a term's notice was held not to apply to judgments as in case of a nonsuit, proceeded on the ground that the rule of the Court of Common Pleas, requiring such notice, was anterior to the act of parliament which gave the judgment in case of a nonsuit. In *Theobald v. Crickmore* (c), this Court thought that as that proceeding had been substituted by the legislature for trial by proviso, such a trial might be had without giving a term's notice; it having been before decided in *May v. Wooding* (d), that a term's notice was not necessary where there had been no proceeding for four terms after verdict. Lord *Ellenborough* in that case said, "The rule of this Court (requiring a term's notice) relates merely to interlocutory stages of the cause." Now, the rule to enter the issue is an interlocutory stage in the cause. As it is convenient that that person, who has suffered so long a time to elapse without taking any step, should give a term's notice of his intention to proceed, I think it reasonable to consider the rule for entering the issue, as one to which the rule

(a) 5 T. R. 634.

(b) *Sir W. Blackst.* 1223.

(c) 2 B. & A. 594.

(d) 3 M. & S. 500.

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of Court requiring a term's notice extends. Let the rule be made absolute.

—
LORD
against
HILLIARD.

Rule absolute without costs, the plaintiff undertaking to bring no action.

*See Tal. v. Jones 3 B. & Ald. 348.
In the Matter of Arbitration between Turner and Bond 5 B. & Ald. 400*

Monday,
June 22d.

In the Matter of CASSELL.

A submission was made to two arbitrators, and to such third person as they should appoint; the award to be made by any two of the three. The two arbitrators met for the purpose of appointing a third; and not being able to concur in such appointment, it was agreed between them that each of them should name two, and that the names of the four should be put into a hat, and that the name drawn should be the third arbitrator; and the arbitrator was so appointed. The award was made by one of the arbitrators originally named, and the person so appointed by the two: Held, that the appointment of the third arbitrator was bad, inasmuch as the choice of the third ought to have been the act of the will and judgment of the two, and matter of choice, not of chance.

A RULE nisi had been obtained for setting aside an award made by an umpire, and one of two arbitrators to whom the submission had originally been made, upon the ground that the umpire had not been duly chosen. The umpire was chosen by lot out of four persons, two of whom were nominated by each of the arbitrators.

F. Pollock (and *Robert Bayly* was with him) upon a former day in this term shewed cause. *Neale v. Ledger* (a) is an authority to shew that the umpire was properly appointed. There it having been agreed that each party should nominate an arbitrator; that the arbitrator so named should nominate a third; and that these three, or any two of them, should make the award: the arbitrators named different persons: but each preferring the one made choice of by himself, though not disapproving of the other, they determined to toss up which of the two nominees should act; and the person upon whom the lot fell, together with the arbi-

(a) 16 *East*, 51.

trator who named him, made the award, without the other first-named arbitrator joining in it; and this Court refused to set aside the award. Lord *Ellenborough* there said, "This is not a tossing up between the two arbitrators which should nominate the third in exclusion of the other, which would have been bad according to the cases cited; but after having, each of them, nominated one, and each of them thinking that the nominee of the other was nearly as proper as his own, they agreed to submit their opinion to this mode of selection of one out of the two fit persons. I cannot see any objection to this. The mode of appointing twelve jurors out of all those who are returned to serve, is by lot." That case is precisely in point. (He was then stopped by the Court.)

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In the Matter
of *CASSELL*.

Godson contra. The choice of an umpire ought to be result of the judgment of the arbitrators, and not left to chance. That was expressly decided in *Harris v. Mitchell* (a). There it was provided by the submission, that the arbitrators should choose an umpire in case they should be unable to agree. The arbitrators not agreeing who should be umpire, agreed to throw cross and pile who should have the naming of the umpire, or whose man should stand. The Master of the Rolls set aside the umpirage upon that ground, and is reported to have said, "An election or choice is an act that depends on the will and understanding; but the arbitrators followed neither in this case; and it is a distrusting of God's providence to leave matters to chance." In *Wells v. Cooke* (b) the arbitrators drew lots who should

(a) 2 Vern. 485.

(b) 2 B. & A. 215.

1829. have the nomination of the umpire, and this Court set the umpirage aside.

In the Matter
of *CARROLL*.

Lord TENTERDEN C. J. It is very difficult to distinguish this case from *Neale v. Ledger*. We will take time to consider of our judgment.

Cur. adv. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court.

This case came before the Court on a rule to set aside an award. The submission was to two persons named, viz. *Adams* and *Chapple*, and such third person as they should appoint; the award to be made by any two of the three. The award was in fact made by one of the persons so named, and the person appointed. The objection was to the manner of his appointment. In support of the rule, *Adams*, one of the persons named, swore, that having met *Chapple* for the purpose of appointing a third arbitrator, and they not being able to agree upon a third person, it was agreed between them that each of them should name two, and the names of the four be written on separate pieces of paper, to be put into a hat, and the name drawn be the third arbitrator. That upon this he (*Adams*) named two, and *Chapple* two others, whom, as the deponent did not know to be proper persons to be named arbitrators, he did not approve of; and the name of one of these persons happened to be drawn. The account of the appointment given by *Chapple* in opposition to the rule, did not materially differ; he swore, that not being able to fix on one person to be approved by both, the usual plan, as he called it, of writing names on paper and drawing

was

was resorted to. It appears that the three arbitrators acted together afterwards in hearing the matter, but *Adams* did not join in the award, and the party applying to the Court was not acquainted with the manner of the appointment until after the award was made. In support of the application to the Court, the cases of *Harris v. Mitchell* (a), and *Wells v. Cooke* (b), were cited. In the first of these cases it is said, that the arbitrators, not agreeing who should be umpire, they threw cross and pile who should have the naming of the umpire, or whose man should stand. The umpirage was set aside. In the other case the arbitrators drew lots who should have the nomination of the umpire, and this Court set the umpirage aside. In support of the award, and against the rule, was cited the case of *Neale v. Ledger* (c), in which the two arbitrators, having each proposed a third, and neither of them liking to abandon his own choice, though not disapproving of the other's choice, they agreed to toss up which of the two proposed should be nominated. In this case the award was held good by the Court: and Lord *Ellenborough* distinguished the case from a tossing up which of the two should nominate a third. And upon the authority of this case, of which the facts differ very little from those of the present, I was, upon the argument the other day, strongly inclined to support the present award; but some of my learned Brothers not concurring in opinion with me, we thought it right to consider and confer together upon the subject; and having done so, we are all now of opinion that this mode of appointment is bad. The parties to the reference expect the con-

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 In the Matter
of CASWELL.

(a) 2 Vern. 485.

(b) 2 B. & A. 218.

(c) 16 East, 51.

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In the Matter
of *CASELL*.

curing judgment of the two in the appointment of a third; and we think it better not to decide the present case upon any nice ground of resemblance to or difference from the others, which might lead to discussion and litigation in other cases, but to lay it down as a general rule, that the appointment of the third person must be the act of the will and judgment of the two, must be matter of choice and not of chance, unless the parties consent to or acquiesce in some other mode. The rule for setting aside the award must, therefore, be made absolute.

Rule absolute.

Monday,
June 22.

LANCASTER against GREAVES.

The summary jurisdiction given to justices by the 4 G. 4. c. 34. s. 5. extends only to cases where the relation of master and servant exists; and, therefore, where *A.* had contracted with *B.* to build a wall for a certain price within a certain time, and having performed part of the work, refused to complete it; this was held not to be within the statute, and that a magistrate who acted upon the complaint of *B.*, and convicted and committed *A.* to prison, was liable to an action for false imprisonment.

TRESPASS and false imprisonment. Plea, not guilty. At the trial before *Hullock B.*, at the *Westmoreland* Spring assizes 1828, it appeared that the plaintiff was a waller, and the defendant a magistrate in the county of *Westmoreland*. In *May* 1827 an information was laid before the defendant by one *T. U.*, charging that the plaintiff did contract with the said *T. U.* to serve him from the 21st of *October* to the 30th of *November* then last, and did afterwards absent himself from his service before the term of his contract was completed, in that he the plaintiff did on the 21st of *October* contract and agree with the said *T. U.* to make and complete a new carriage road of certain dimensions, according to a written specification, for the sum of 27*l.*,

and

and that the said road was to be completed according to such contract on or before the latter end of the month of *November* then last past; that plaintiff entered upon the contract, performed part of the work, and left the remainder unfinished. Of this offence the defendant convicted him under the statute 4 G. 4. c. 34. s. 3., and committed him to gaol for one month. For the defendant, it was contended, that the conviction was an answer to the action. On the other hand, it was said that the magistrate had no jurisdiction in this case, for that the facts did not bring it within the 4 G. 4. c. 34. s. 3. The learned Judge directed a nonsuit, giving the plaintiff leave to enter a verdict in his favour for 10*l.*, the jury having mentioned that as the proper amount of damages, if the plaintiff were entitled to recover. In *Easter* term following a rule nisi for that purpose was granted; against which,

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LANCASTER
against
GEEVES.

Courtenay and *Aglionby* now shewed cause, and contended, that the plaintiff clearly was a labourer, and as such within the description of persons affected by the 4 G. 4. c. 34. s. 3. He also contracted to serve within the meaning of that section. He contracted to do certain work within a certain time, and might, therefore, be said to have contracted to serve for that time. This was so alleged in the information; and if the plaintiff had meant to deny that he had contracted to serve, he should have made that defence at the time, *Mann v. Davers*. (a) [Lord *Tenterden* C. J. As to matter of fact, the rule certainly is so, but not as to matter of law.] The work to be done in this case can hardly be distinguished from that in *Lowther v. Lord Radnor* (b),

(a) 3 B. & A. 103.

(b) 8 East, 113.

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LANCASTER
against
GREAVES.

and there the party digging a well was held to be a labourer within the 20 G. 2. c. 19. Now the 4 G. 4. c. 34. was intended to enlarge the powers given to justices by the former act. If the plaintiff had performed his contract, and then summoned his employer for non-payment of his wages, it could hardly have been contended that the magistrate had not jurisdiction. According to *Branwell v. Penneck (a)*, he would have had jurisdiction; and if so, he had jurisdiction also in case of a complaint by the employer, that the work was left unfinished.

Blackburne (and *Armstrong* was with him,) contra, was stopped by the Court.

LORD TENTERDEN C.J. In order to bring a case within the statute in question, it must appear that the relation of master and servant has been established. The information in the present case did not shew this, but that the plaintiff and the complainant stood in the situation of two contracting parties for the making of a road; the relation of master and servant was not shewn. In *Lowther v. Lord Radnor*, the real facts of the case were very like the present, but the decision of the Court proceeded on the facts laid before the justice, and the facts there stated in the information did shew the relation of master and servant; and the only question raised was, whether a labourer employed in digging a well was within the description of persons made subject to the provisions of the statute. Here the information itself failed to shew such relation, the defendant, therefore,

(a) 7 B. & C. 536.

had

had not jurisdiction, and the plaintiff, consequently, was entitled to recover in the present action.

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LANCASTER
against
GREEN.

BAYLEY J. If an information laid before a magistrate charges that which is within his jurisdiction, he may act upon it, unless the party against whom the information is laid proves the real facts of the case, taking it out of the jurisdiction of the justice. But here the information did not bring the case within the defendant's jurisdiction, it did not shew the existence of the relation of master and servant; and I think that was necessary in order to give the defendant authority to act upon the complaint.

LITLEDALE J. The relation of master and servant is essential, in order to give the magistrate jurisdiction. The first clause of the act applies to masters and apprentices, the third to masters and servants; the present plaintiff was not the servant of the complainant. It makes no difference that he was called labourer or waller, for the statute speaks of labourers *or other persons* having contracted to serve. The information would, therefore, be just as good without the word "labourer" as with it.

PARKE J. I am entirely of the same opinion. The statute 4 G. 4. c. 34. s. 3., upon which this question turns, applies only to cases of contracts to serve. There may indeed be a service, not for any specific time or wages, but to be within the statute there must be a contract for service to the party exclusively. Here there was no such contract, but a contract to make a certain road for a certain price. That was not within

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against
GARAYES.

the statute, and the defendant exceeded his jurisdiction in committing the plaintiff; he was, therefore, liable to the action, and the rule for entering a verdict for the plaintiff must be made absolute.

Rule absolute.

Litchman. v. Taylor, 10 B.C. 28
Richford. v. Davis 5 M. & W. 2,

Tuesday,
June 23d.

BOURNE against FREETH.

It being in contemplation to form a company for distilling whiskey, the following prospectus was issued in May 1825:—

“The conditions upon which this establishment is formed are, the concern will be divided into twenty shares of 100*l.* each, five of which to belong to A. B., the founder of the works; the other fifteen subscribers to pay in their subscriptions to M. and Co., bankers, Liverpool, in such proportions as may be called for. The

concern to be under the management of a committee of three of the subscribers, to be chosen annually on the 10th of October, ten per cent. to be paid into the bank on or before the 1st of June next:” Held, that this prospectus imported only that a company was to be formed, not that it was actually formed, and that a person who subscribed his name to this prospectus, and who was present at a meeting of subscribers when it was proposed to take certain premises for the purpose of carrying on the distillery, which were afterwards taken, and solicited others to become shareholders, but never paid his subscription, was not chargeable as a partner for goods supplied to the company.

ASSUMPSIT for goods sold and delivered. At the trial before *Hullock B.*, at the Spring assizes for the county of *Lancaster* 1828, it appeared that the action was brought to recover the price of 345 quarters of malt sold and delivered in *August* 1826, by the plaintiff to one *Langley*, who conducted the *Hunter Street* distillery at *Liverpool*. The question was, whether the defendant had rendered himself liable as a partner in that establishment. It appeared that in the Spring of 1825 *Sir W. Fairlie* was the occupier of an estate at *Maghull*, seven miles from *Liverpool*, called *Broadwood*, and it being understood that the legislature was about to pass an act to allow the distillation of whiskey in *England*, *Sir W. Fairlie* proposed to form a company for that purpose, and to carry on the business at *Broadwood*; and in *March* 1825 the following prospectus was issued:—“As the legislature has now

authorized

authorized the distilling of whiskey in *England*, a company is proposed to be formed near *Liverpool* for that purpose, and to get a man from *Inverness-shire* to distil in the small still the spirit in the way practised at *Ferintosh* and *Glenlivet*, so that the quality, not the quantity, will be the basis on which this company pledge themselves to make their whiskey. The concern to be divided into forty shares of 100*l*. each, one half of which the gentlemen who conduct the work will take. The other twenty shares will be filled up by subscribers. Subscribers to pay in their money to Messrs. *Moss* and Co., bankers, *Liverpool*, on account of the *Maghull* Distillery Company, by the 1st of *May*." This prospectus was signed by Sir *W. Fairlie*, the defendant, and other persons. The act of parliament passed on the 27th of *June* 1825, but was not to take effect until *January* 1826; and it prohibited all persons from carrying on any distillery at any greater distance than a quarter of a mile from a market town. On the 20th of *May* the defendant, Sir *W. Fairlie*, and two other persons who had signed the first prospectus, met at *Liverpool*, and a second prospectus was drawn up and signed by the four persons then present, and afterwards by others. That prospectus was in the following terms: — "As the legislature has authorized the distilling of whiskey in *England*, to commence the 10th *October* next, and having limited the situation of those distilleries to within a quarter of a mile of a market town, the Distillery Company forming at *Maghull* will necessarily have to occupy premises within that distance of *Liverpool*. The conditions upon which this establishment is formed are, first, they pledge themselves they will distil nothing but the purest malt spirit in the smallest stills that government will license, and on the same plan

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practised in the Highlands of *Scotland*, for which purpose an eminent distiller from *Inverness-shire* will be engaged; secondly, the concern will be divided into twenty shares of 100*l.* each, which are transferable, five of which belong to Sir *W. Fairlie*, Bart., the founder of the works, the other fifteen subscribers to pay in their subscription to Messrs. *Moss and Co.*, bankers, *Liverpool*, in such proportions as may be called for; thirdly, the concern to be under the management of a committee of three of the subscribers, to be chosen annually upon the 10th of *October*; fourthly, regular books to be kept, which shall be open for inspection of any of the subscribers, and a division of the profits made twice a year, at *Lady-day* and *Michaelmas*; fifthly, ten per cent. to be paid into the bank on or before the 1st of *June* next." At this meeting it was proposed that the premises in *Hunter Street* should be taken, and the defendant did not express any dissent to that proposition. It was agreed that the parties present should solicit persons of respectability in *Liverpool* to become shareholders. Sir *W. Fairlie* afterwards inclosed a copy of the prospectus in the following letter to the defendant: — "I inclose the prospectus: if Lord *Blayney* and Sir *J. Tobin* take shares, let them subscribe it, it is then full. I have directed a copy of the new act (when filled up) to be sent to me to your care, which you will take care of: Mr. *J. Drinkwater* wished to see it. On the 24th of *May* 1825, the defendant sent the following answer: — "I should have written to you before, but Sir *John Tobin* having been absent for the last few days, prevented me. I was with him this morning, and shewed the prospectus, but he seemed not to think much of it, and declined becoming a shareholder; so I am afraid his reluctance will deter Lord
Blayney,

Blayney, who will be here about the beginning of next week. I had some conversation with Mr. *John Richardson* upon it; however he does not appear to think it will answer on account chiefly of the trouble the excise at *Liverpool* give to all concerns of this nature. Not being a judge, and totally unacquainted, I cannot give an opinion. On your return all parties must lay their heads together. *John Drinkwater* I have not seen." In *June* 1825, one *Murray* was engaged by Sir *W. Fairlie* to carry on the distillery, and the names of *Murray* and Co. were affixed on the premises; and in that month *Sutherland* and Co., who were brass-founders at *Liverpool*, were employed by Sir *W. Fairlie* to fit up the distillery, and he shewed them the two prospectuses signed by the defendant. To the second prospectus there were subscribed the names of ten persons, including those of Sir *W. Fairlie* and the defendant. On the 30th of *June* 1825, Sir *W. Fairlie* wrote to the defendant a circular letter, of which the following is a copy:—

"As Mr. *W. Murray*, distiller, has taken the premises to fit up the same for commencing distilling whiskey, agreeable to the prospectus, of which you are a shareholder, upon the 10th of *October* next, it will be necessary for you to pay in the amount of your subscription, 100*l.*, to Messrs. *Moss* and Co. on or before the 1st of *August* next, on his account, to enable him to complete the arrangements necessary: the receipts will be left at the bank." And at the same time he wrote to the defendant the following letter:—"I annex a circular, and congratulate you that Mr. *Murray* has undertaken the management, as we could not have found a more fit person to conduct it with every prospect of advantage. He has stipulated that all the subscriptions shall be paid in full by the 1st of *August*, and failing that

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being done, he is to have the shares forfeited : no more than the 100*l.* will be required from any of the subscribers ; and there is every reason to expect the profits will be handsome, of which you will be entitled to a twentieth share." On the 23d of *August* 1825, Captain *Edmunds*, by the direction of the defendant, addressed to Sir *W. Fairlie* a letter, of which the following is an extract : — " With respect to the subscription for the distillery, General *Freeth* requested me to say that the notice was so short from the time he received your letter (forwarded by me) to the period mentioned by which the shares were to be forfeited, it was out of his power, from unforeseen causes, to be able to lodge the amount within the time prescribed." It appeared, further, that not one of the persons who had signed the prospectus had paid their subscriptions. In *December* 1825 *Langley* was employed to conduct the business, and the names of *Langley* and Co. were fixed on the premises. *Langley* wishing to purchase malt of the plaintiffs, referred them to *Sutherland* and Co. ; and the latter informed the plaintiff that the several persons whose names were subscribed to the second prospectus (including the defendant) were partners. Upon this evidence, it was contended by the defendant's counsel, that he was not chargeable as a partner ; first, that he was not an actual partner, entitled to share the profits of the distillery, if any there should be, with those who carried it on, because he had never paid the subscription, the payment of which was to entitle him to share in such profits. Secondly, that he had never held himself out to the world as a partner, by reason of his having signed the prospectus. That prospectus, as its very term imported, contained no more than a proposal for a partnership to be formed

at

at a future period, upon certain terms. The partnership was not to be commenced until a given capital was obtained. The prospectus amounted to no more than a proposal to form a partnership, provided other subscribers and a capital of 2000*l.* could be obtained. No person reading this prospectus ought to have inferred from it that the defendant authorized his credit to be pledged as a partner until the proper capital could be obtained. The learned Judge inclined to think that the defendant, by having signed the prospectus, had made himself chargeable as a partner, but said he would reserve that point for the consideration of the Court of King's Bench. The defendant then attempted to shew, that even if there had been a partnership, he had put an end to it before the goods were supplied by the plaintiff, and for that purpose called Captain *Edmunds*, who had written the letter of the 25th of *August* 1825 to Sir *W. Fairlie*, by desire of the defendant; he stated that he had afterwards had a conversation with Sir *W. Fairlie* on the subject of that letter, and that the latter expressed to him his regret that the defendant declined to have any concern in the distillery. The learned Judge then left it to the jury to say, whether, assuming that the defendant had been a partner, he had done any thing to put an end to the partnership. The jury found that he had not done any thing to put an end to the partnership. The learned Judge then directed a verdict to be entered for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

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F. Pollock, *Starkie*, and *Alderson* now shewed cause. It is quite clear, that a partnership was formed between certain persons to carry on the *Hunter Street* distillery. The

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The only question is, whether the defendant was a partner in that company. [Lord *Tenterden* C.J. In order to charge the defendant as a partner, it must be shewn either that he was an actual partner, and as such entitled to share the profits (if any there should be), and liable to contribute to the losses, or that he held himself out to the world as a partner, and thereby gave the company the credit of his name.] First, he was an actual partner. The business was commenced before the full capital required had been obtained. If any profits had been made, the defendant would have been entitled to share them rateably with the other subscribers. But, secondly, at all events by having signed the prospectus, he held himself out to the world as a partner. Any person reading that prospectus might fairly conclude that the partnership was already formed, and that the persons who had signed the prospectus were the partners. The very first sentence imports that a partnership was already formed: the words are, "The conditions upon which this establishment is formed are," &c. Besides, the defendant was present when it was proposed to take the premises in *Hunter Street*: he did not express any dissent, and he solicited other persons to become members of the company. A tradesman or other person seeing that business actually carried on in the name of the company, and learning on enquiry that the defendant and others had signed the prospectus, which was, in fact, the only instrument executed by the parties, might reasonably suppose that those persons were the principals, and that he was safe in giving them credit. In *Vice v. Lady Anson* (a), the defendant was not an original subscriber, and the plaintiff, at the time

(a) 7 *Barn. & Cres.* 409.

when

when he supplied the goods, did not know that the defendant had any interest, or that she thought that she had any interest in the same; here, on the contrary, the prospectus was signed by the defendant, and the plaintiffs were informed of the fact. In *Perring v. Hone* (a), the plaintiff's name was entered in a book with those of several other subscribers to a projected joint stock company. The plaintiff received certain scrip receipts, but sold them before the deed for the formation of the company was executed, and he was not a party to the deed, and yet it was held that he was a partner in the concern. And in *Lawler v. Kershaw* (b), Lord Tenterden held *anisi prius*, that a party paying a deposit on shares in a trading company, and afterwards signing the deed of partnership, was to be considered as a partner from the time of his paying the deposit.

J. Williams (and *Patteson* was with him,) contra, was stopped by the Court.

LORD TENTERDEN C. J. On this evidence, I think that the defendant was not a partner as between him and the other persons who contemplated being members of the company, whoever they might be. That is shewn by the letter of the 25th of August 1825, which was written by the authority of the defendant. But although he might not actually be a partner, yet if he held himself out to the world as a partner he will be chargeable. The question, whether he did hold himself out to the world as a partner depends entirely on the effect of the prospectus which he signed. That instrument indicates, that a company was about to be formed, not that one

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(a) 4 Bingham 28.

(b) Moody & M. 93.

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was actually formed. It shews only that it was in the contemplation of the parties who had subscribed their names to it, to establish a company on certain conditions. The words relied upon, to shew that the company had actually been formed, are, "The conditions upon which this establishment is formed are, &c." Undoubtedly the import of those words, taken by themselves, might be, that a company was actually formed. But the remaining parts of the prospectus import that a company was to be formed thereafter. It goes on, "The concern will be divided into twenty shares of 100*l.* each, which are transferable, five of which to belong to Sir *W. C. Fairlie*, the founder of the works, the other fifteen subscribers to pay in their subscription to Messrs. *Moss and Co.*, bankers, *Liverpool*, in such proportions as may be called for. The concern to be under the management of a committee of three of the subscribers, to be chosen annually on the 10th of *October*. Ten per cent. to be paid into the bank on or before the 1st of *June* next." The defendant, therefore, had subscribed his name to a paper, the import of which was, that a company was to be formed thereafter. His having signed that paper does not indicate to any person who reads it that he has become a member of a company already formed. He has not, therefore, held himself out to the world as a partner in a company already formed. The rule for entering a nonsuit must therefore be made absolute.

BAYLEY J. I think that a nonsuit ought to be entered. In order to make a man liable as a partner, he must either be an actual partner or have done something to enable a person to treat him as a partner. Here
 he

he clearly was not an actual partner. It is said that the plaintiff is entitled to treat the defendant as a partner by reason of his having signed the prospectus in *May* 1824. If that instrument imports that the person who subscribed it was at the time a partner he would undoubtedly continue such until the partnership was duly put an end to; but the prospectus imports that something was to be done before a partnership was to be formed, not that it was already formed. It is clear that the defendant did not become a partner by any act done by him after he signed the prospectus. On the 24th of *May* he writes that he had mentioned the matter to other persons, who had declined becoming members. So things remained until *August* 1825, no act having been done by the defendant in the mean time. In *August* Captain *Edmunds*, by the direction of defendant, writes, that he could not raise the money to pay the sum required, to entitle him to become a partner. The plaintiffs, therefore, when they saw his name to the prospectus, had no right to infer from the terms of it that he had become a partner at the time when he signed it: they ought, before they delivered goods on his credit, to have enquired whether he had become a partner subsequently, and if they had so enquired, they would have found that he had not.

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LITLEDAL J. I am of the same opinion. The goods were not ordered by the defendant but by another person. That person could not bind the defendant without some authority, express or implied. He had no express authority; but it is said that he had an implied authority because he was a partner, and one partner has an implied authority to bind another in part-

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partnership transactions. Then the question is, whether the defendant was a partner. Unless there was a partnership formed, the defendant could not be an actual partner. It is clear that a partnership was never actually formed between the defendant and the other persons who contemplated carrying on the establishment. Then supposing that no actual partnership was formed, it is said that the defendant held himself out to the world as a partner by having signed the prospectus. But he had not thereby given authority to any person to carry on the business on his account. Besides signing the prospectus, he wrote a letter to Sir *W. Fairlie* on the 28th of *May*; but in that letter he merely states that he had solicited some person to become a member, who had declined it; and that he knew nothing about the business. Then in the letter of the 23d of *August*, he informs Sir *W. Fairlie* that he had been unable to pay the subscription, the payment of which, at all events, was necessary, in order to entitle him to participate in the profits, if any there should be. These letters do not shew that he gave any authority to any person to carry on the business for him or in his name. The defendant, therefore, did not, either by his having become an actual partner or by holding himself out to the world as a partner, give any implied authority to the person who ordered these goods of the plaintiff to bind him, consequently he is not liable to pay for them. The rule for a nonsuit must, therefore, be made absolute.

Rule absolute.

PARKE J., having been concerned in the cause while at the bar, gave no opinion.

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HAIRE *against* WILSON.Thursday,
June 25th.

THIS was an action brought by the plaintiff against the defendant, the proprietor and publisher of a weekly newspaper called "*The Hull Advertiser and Exchange Gazette*," for publishing therein the following libel, purporting to be the report of certain proceedings in the Insolvent Debtor's Court, *London*: — "In the Insolvent Debtor's Court, *London*, yesterday week, *Francis Harrison*, late of *Humbleton*, was opposed by *Mr. Beckwith*, executor of the late *Mr. Dobson* of *Brandsburton*. The grounds of opposition were, first, that the insolvent had made away with his property by giving several valuable horses to his sons, mere boys, and in collusion with his landlord *Mr. Haire*, setting up a fictitious distress; and, secondly, that he had raised a vexatious defence to an action at law, in which *Mr. Beckwith* was plaintiff. After a long examination, in the course of which the insolvent swore that the distress was a bonâ fide one for rent actually owing, and that there was no agreement between himself and his landlord, the case was adjourned, with an order for the insolvent to produce all papers and documents relative to the distress and the value of his property, and also to produce his landlord." Plea, not guilty. At the trial before *Hullock B.* at the Spring assizes for the county of *York* 1828, the publication of the libel stated in the declaration was proved. It was contended, on the part of the defendant, that though the publication might be a libel upon the insolvent, it was not a libel upon the plaintiff. The learned Judge directed the jury to find for

In an action for a libel, the Judge left it to the jury to say, whether the defendant intended to injure the plaintiff: Held, that the direction was wrong, inasmuch as if the tendency of the libel was injurious to the plaintiff, the defendant must be taken to have intended the consequence of his own act.

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for the plaintiff if they thought the defendant intended to injure him by publishing the libel in question, otherwise for the defendant. The jury having found for the defendant, the learned Judge afterwards said that he thought the verdict should be for the plaintiff, with 1s. damages, with liberty to the defendant to move to enter a verdict in his favour; and no objection being made, the verdict for the plaintiff was entered accordingly. A rule nisi having been obtained for entering a verdict for the defendant,

Brougham and Starkie now shewed cause. The case was not properly presented to the jury; for where the natural tendency and import of the language used in any publication is to defame and injure another, the law will there presume that the publisher acted maliciously; or, in other words, with the intention to effect those consequences to which the means which he used obviously tend. Here the import of the language contained in the libel is injurious to the plaintiff; it states in effect that he had been charged with a fraud. That being so, the learned Judge ought to have told the jury that it was a libel, and to have left to them to say whether the defendant published it, and whether the innuendoes were proved. But in effect the question left to the jury was, whether the defendant had been guilty of malice in fact. Now in *Bromage v. Prosser* it was laid down as a rule, that in ordinary actions for slander, malice in law is to be inferred from the publishing the slanderous matter, the act itself being wrongful and intentional, and without any just cause or excuse; but in actions for slander, *prima facie* excusable on account of the cause of publishing

lishing the slanderous matter, malice in fact must be proved. The publication of this libel was not *prima facie* excusable, and it was not disputed that the defendant published it, and that it related to the plaintiff. The learned Judge, therefore, did right in having the verdict entered for the plaintiff.

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F. Pollock and Alderson contra. The publication in question did not contain any libel upon the plaintiff. It imputed no blame to him. There was no ground, therefore, for submitting any question to the jury.

LORD TENTERDEN C. J. The Judge ought not to have left it as a question to the jury, whether the defendant *intended* to injure the plaintiff, for every man must be presumed to intend the natural and ordinary consequences of his own act. If the Judge thought the tendency of the publication injurious to the plaintiff, he ought to have told the jury it was actionable, and that the plaintiff was entitled to a verdict.

BAYLEY J. Imputing to the landlord, that he col-
luded with the insolvent in putting in a distress, was a libel.

LITLEDALE J. If the tendency of the publication was injurious to the plaintiff, then the law will presume that the defendant, by publishing it, intended to produce that injury which it was calculated to effect. If it had that tendency, there can be no doubt it was a libel.

Rule discharged. (a)

(a) *Starkie on Libel*, 2d edit. vol. i. p. 213., vol. ii. p. 51.

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*Foster v. Arnold & Co. 12 178.**Thursday,
July 2d.*HALL *against* CURZON, LETT, and Others.

In an action brought to charge *A.* as a partner to a trading company, a witness, who, by other evidence than his own, appeared to be a shareholder in the company, was held to be competent to prove that *A.* was a partner.

ASSUMPSIT for work and labour, &c. Plea, general issue. At the trial before Lord *Tenterden* C. J., at the *London* sittings after *Easter* term 1828, it appeared that the action was brought against the defendants, as members of the "City of *London* Central Street and Northern Improvement Company." In order to shew that the defendant *Lett* was a member of the company, the plaintiff called a shareholder and director of the company, and he was proved to be a shareholder, not merely by his own admission of the fact, but by other evidence in the cause. It was contended that he was incompetent, on the ground that he had an interest in fixing the defendant as a copartner, inasmuch as he would be liable to contribute in a certain proportion, and the witness's contribution would be proportionably diminished. Lord *Tenterden* C. J. overruled the objection, and directed the jury to find a verdict for the plaintiff for the amount of his demand, but reserved liberty to the defendant to move to enter a nonsuit.

Campbell, on a former day in this term, moved accordingly. This case is distinguishable from *Blackett v. Weir* (a). In that case, it appeared by the admission

(a) 5 B. & C. 385.

of the witness alone that he was jointly liable. Here that fact was proved by other evidence. If an action were brought by *A. B.* upon a written contract signed by *J. S.*, *J. S.* would evidently have an interest in shewing that others were jointly liable with him. He would thereby reduce the amount of his own contribution. [*Parke J.* In *Luckett v. Graham* (a), which was an action against one of three obligors, a co-obligor was allowed to be a witness to prove the execution of the bond by the defendant.] There it would appear by the bond itself that there were three joint contractors; here the witness is called to prove the existence of the joint contract.

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against
CURSON.

Cur. adv. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court. We are of opinion that there ought not to be any new trial in this case. It was attempted to distinguish *Blackett v. Weir* (b), on the ground that there the fact of the witness being a shareholder was proved by his own admission, whereas in this case it was proved by other evidence, and *Luckett v. Graham* (which was also referred to by my Brother *Parke*), on the ground that the bond itself shewed that there were three joint contractors. We have considered the point, and think there is not sufficient ground to distinguish this in principle from the former cases. The case is similar in principle to that of co-trespassers. The recovery against one of several co-trespassers is a bar to an action against the others. In practice, the co-

(a) 1 Str. 35.

(b) 5 B. & C. 385.

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against
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trespasser is constantly called to prove that he did the act by the command of the defendant.

Rule refused. (a)

(a) See also *York v. Blott*, 5 M. & S. 71. In a plea in abatement, a party who according to the plea ought to be joined, is a competent witness for the plaintiff (*Cosham v. Goldney*, 2 Stark. 414.; *Hudson v. Robinson*, 4 M. & S. 475.); but not for the defendant (*Iwans v. Yeatherd*, 2 Bingh. 153.; *Simons v. Smith*, 1 Ry. & Moody, 29.)

Tuesday,
June 30.

The KING against WHITAKER, FOWLER, and MARSHALL.

By a local act for draining a particular district, the commissioners were authorized to assess and tax upon the whole district such sums as should be necessary for carrying into effect the objects of the act, and to elect assessors to apportion such sums of money amongst the several parishes, townships, and places within the district. The commissioners having appointed three assessors, the three met to agree upon an apportionment; two out of the three agreed, but the third

would not concur: Held, that the making of the apportionment being matter of public duty and trust, an apportionment made by two, at a meeting of the three, was valid.

ON the last day of *Easter* term a rule was obtained by *N. R. Clarke*, calling upon the defendants to shew cause why a mandamus should not issue, commanding them to apportion amongst the parishes, townships, and places within a certain district in *Lincolnshire*, called the *Level of the Ancholme*, a sum of 30,000*l.* which had been assessed and taxed upon that district by certain commissioners appointed under the authority of the 6 G. 4. c. 145. (an act passed for the purpose of completing the drainage of the level of the *Ancholme*, and also of making that river navigable from the river *Humber* to a place called *Bishop's Brigg*, in the act mentioned.) By the said act, the commissioners are empowered and required to assess and tax upon the whole district such sums of money (not exceeding 30,000*l.* in any one year) as shall be necessary for carrying into effect the objects of the act; and they are also empowered and required to elect and appoint, in the manner pointed out in the act, "one

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or more person or persons to be assessor or assessors, who are to apportion such sums of money as shall be assessed by the commissioners upon the district at large, amongst the several parishes, townships, and places within the district, according to certain rules prescribed by the act, and such apportionment is to be made by an award or instrument in writing, to be signed *by the said assessor or assessors.*" The affidavit in support of the rule stated, that the three defendants had been duly appointed assessors; that the commissioners had duly assessed a sum of 30,000*l.* upon the whole district; that the defendants had been called upon to apportion that sum amongst the several parishes, townships, and places, according to the provisions of the act; that they had met together several times for the purpose of agreeing upon and making such apportionment; that two of the defendants, *Whitaker* and *Marshall*, had finally agreed upon and signed an apportionment; that *Fowler* attended all the meetings as assessor, and was present when the apportionment was signed by the other two, but that he refused to concur in or sign it. An affidavit made by *Fowler* stated a number of facts as to the merits of the apportionment which had been signed by the other two, but the Court refused to go at all into that question.

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against
Whitaker.

Denman and *Clinton* for the defendant *Fowler*, on a former day in this term, shewed cause. The three assessors must concur to make a valid apportionment. If one dissent, he cannot be compelled to concur in the judgment of the others, or to sign an apportionment; in such case no apportionment can be made. If the

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assessors cannot agree, there is nothing in the act to prevent the commissioners from dismissing them, and appointing others.

The *Attorney-General* and *Coleridge* for *Whitaker* and *Marshall*. The rule must be discharged, because a valid apportionment has already been made. An apportionment has been made by *Whitaker* and *Marshall*, that is, by a majority of the three assessors, and the concurrence of the third assessor is not necessary. Where a number of persons are invested with powers not of mere private confidence, but of a general nature, and all of them are regularly assembled, the majority will bind the minority, and their acts will be the acts of the whole, *Grindley v. Barker* (a), *Cortis v. The Kent Water Works Company* (b). In such a case as this, unanimity cannot be required to make a valid apportionment. The commissioners are to appoint "one or more person or persons to be an assessor or assessors." They might, if they pleased, have appointed a dozen. Can it be said, that, if they had done so, one dissentient assessor could have controlled the judgment of the other eleven, or have prevented any apportionment being made?

N. R. Clarke in support of the rule. The object of the commissioners in making the application was to obtain the opinion of the Court as to the validity of an apportionment made by a majority of the assessors. If the Court think the apportionment by the majority valid, and discharge the rule *on that ground*, the object of the motion will have been attained. If it is necessary

(a) 1 Bos. & Pul. 229.

(b) 7 B. & C. 514.

that

that all the assessors should concur, the act of parliament will become a dead letter, as there is no probability of the assessors concurring, and the commissioners have no power (as has been supposed) to dismiss them and appoint others. They are only empowered to appoint other assessors in the room of such as may die, or neglect or refuse to act, or become incapable of acting. Here the assessors met together, and acted as assessors, although they did not concur in the same apportionment; and they will continue to do so, so that no others can be appointed. In *Grindley v. Barker (a)*, the acts to be done by the triers were not directed to be done by them or the majority of them, and this was stated as an objection to the majority, but it was overruled.

Cur. adv. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court.

This was an application for a mandamus under a particular act of parliament, by which act the commissioners acting under it were authorized to appoint one or more person or persons to be assessor or assessors. They had appointed three; the three assessors had met; two had agreed to making an apportionment, the third had refused. Now, if by law an apportionment made by two, according to their opinion, after a meeting of all three, is good, we ought not to grant a mandamus to the three; and we are of opinion, that by law an apportionment made by the two (the three having met) is a good apportionment. The case of *Grindley v. Barker (a)*; which was decided in the Court of Common Pleas, was

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(a) 1 Bos. & Pul. 229.

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to that effect. As well on the authority of that case, as on the general principle, that this being a matter of public duty and public trust, (not of private authority, like a reference or award,) we think an apportionment made by the two was good. We therefore cannot make the rule absolute for a mandamus. Lord *Tenterden*, after consulting with the other Judges, added, Perhaps it may not be necessary that all should meet, certainly a majority must meet. In this case, all the three *had met*.

BAYLEY J. A majority of those who meet must concur.

PARKE J. The majority must meet, and the majority must certainly concur.

Rule discharged.

Thursday,
July 2d.

The KING *against* EDWARDS, in a Cause of LONG and FURZE.

An attorney, in custody under an attachment for non-payment of money pursuant to a rule of court, is entitled to be discharged from custody on having become bankrupt, and obtained his certificate, even though he received the money in the course of his employment as attorney.

IN this case, the defendant *Edwards*, an attorney of this Court, had been professionally employed by *Long* to recover from *Furze* a sum of money, which he, *Long*, had paid as a deposit to *Furze*, upon an agreement for the purchase of an estate from *Furze*. The title turned out to be defective. The defendant brought an action, and recovered the whole with interest; but instead of paying it to *Long*, applied the same to his own use. The defendant delivered his bill of costs against *Long*, which were taxed in *Hilary* term 1829, and upon such taxation a balance of 30*l.* 7*s.* 3*d.* was found to be due

to

to *Long*, which the defendant was ordered by a Judge's order to repay; but having been unable to do so, on demand by *Long*, the Judge's order was made a rule of Court, and upon that rule *Long* sued out an attachment against the defendant on the last day of *Hilary* term. On the 10th *March* 1829, a commission of bankrupt issued against the defendant, and on the 28th of *April* he passed his last examination. On the 6th of *June* the defendant was arrested under the attachment, and on the 15th obtained the Chancellor's allowance to his certificate, the same having been previously signed, as required by the statute. A rule nisi having been obtained for discharging the defendant out of custody,

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Kelly now shewed cause. The defendant is not entitled to be discharged from custody. The 6 G. 4. c. 16. s. 121. entitles a bankrupt who has duly conformed himself to the laws in force concerning bankrupts, to be discharged from all debts due by him when he became bankrupt, and from all claims and demands thereby made proveable under the commission, in case he shall obtain a certificate of such conformity so signed and allowed. Now, although the defendant might have been entitled to his discharge if he had been in execution for a debt, he is not entitled to be discharged from custody under an attachment for a contempt. Besides, the defendant, who is an attorney of this Court, and who received the money in the course of a suit, is in a different situation from a mere trader. The party who sought to recover his money was compelled to trust an attorney.

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The *Attorney-General* and *Follett* contra. An attachment for non-payment of money pursuant to a rule of Court, though founded upon a contempt of Court, is in substance process to enforce the payment of a debt. The debt is proveable under the commission, and the debtor, after he has obtained his certificate, is entitled to be discharged out of custody, *Baker's case* (a), *Parker, Ex parte* (b), *Wall v. Atkinson* (c), *Nowers v. Colman* (d), *Eicke, Ex parte* (e).

LORD TENTERDEN C.J. It has always been held, that attachments for non-payment of money are in the nature of civil process to enforce the payment of a debt; that persons in custody under attachments for disobedience of an order of Court for payment of a sum of money, are in custody for a civil debt, and are subject to and entitled to the advantage of the bankrupt laws; and that the debt is proveable under the commission; and that the debtor, if in custody for that debt, is entitled, upon obtaining his certificate, to be discharged. That being so, the defendant (if he had not contracted the debt in question in the course of his employment as attorney), would have been entitled to his discharge. But then it is said, that he, having received the money in the course of his employment as an attorney, ought not to be discharged. The plaintiff, however, by reason of the defendant's being an attorney, had the advantage of an attachment against him. The defendant, if he has made himself liable to the bankrupt law, is entitled to its advantages, one of which is, that he has a right to be dis-

(a) *Str.* 1152.(b) 3 *Ves.* 554.(c) 2 *Rose*, 196.(d) *Buck's B. C.* 5.(e) 1 *Glyn & J.* 261.

charged

charged from custody in respect of all debts proveable under the commission. The debt due to *Long* was such a debt. The rule must, therefore, be made absolute.

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Rule absolute.

MARSHALL and Another, Executor and Executrix of HOBSON, *against* WILLDER. *Friday, July 3d.*

(In Error.)

ASSUMPSIT by *Willder* against *Marshall* and *Hobson*, executor and executrix of *Hobson*, for goods sold and delivered to the testator on promises by him; and on an account stated with the defendants, as executor and executrix of monies due from the testator. Pleas, first, non-assumpsit as to all the promises; second, plene administravit. The plaintiff joined issue, and went to trial on the first plea, and took judgment of assets quando, &c. upon the second. The jury found for the plaintiff as to the promises alleged to have been made by the testator, with 27*l.* damages, and 40*s.* costs, and for the defendants as to the promise alleged to have been made by them; and the plaintiffs' costs of increase were taxed at 91*l.* 6*s.* 2*d.*, and judgment was entered up for these damages and costs, "to be levied of the goods and chattels which were of *T. Hobson* at the time of his death in the hands of the defendants, as executor and executrix as aforesaid, to be administered, if they have so much thereof in their hands to be administered, and if they have not so much thereof in their hands to be administered, then the sum of 93*l.* 6*s.* 2*d.* of the damages

Assumpsit against an executor on promises by the testator. Pleas, non assumpsit, and plene administravit. Plaintiff joined issue, and went to trial, and obtained a verdict on the plea of non assumpsit, and took judgment of assets quando on the plea of plene administravit: Held, that he was entitled to judgment for the costs to be levied de bonis propriis of the executor, if there were not assets of the testator sufficient to satisfy them.

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mages aforesaid, being for the costs and charges aforesaid, to be levied of the proper goods and chattels of the defendants. Error and joinder in error.

Wightman for the plaintiff in error. The plaintiff below was not entitled to any costs from the defendants *de bonis propriis*. If, instead of taking judgment of assets *quando acciderint*, he had taken issue on the plea of *plene administravit*, and gone to trial on that as well as the general issue, and the defendants had obtained a verdict on the second issue, they would have been entitled to the costs, *Edwards v. Bethel* (a). Now, the plaintiff cannot, by admitting the truth of the defendants' plea, place them in a worse situation than if an issue on that plea had been found for them. An executor is only liable to costs *de bonis propriis*, if he pleads a plea which he knows to be false, and omits to plead *plene administravit*, *Erving v. Peters* (b). And the general issue is not considered a plea falling within that rule. The judgment in this case must have been taken from *Dearne v. Grimp and Others* (c), where the prothonotary reported that if an executor pleaded the general issue; and specialty debts, and no assets ultra, and on a trial the first were found for the plaintiff, and the second for the defendant, he would, nevertheless, be liable to costs *de bonis propriis*. That rule was followed in *Hindsley v. Russell* (d), but that was overruled in *Edwards v. Bethel*, where the question was fully considered, and the Court held, that an executrix who pleaded the general issue, *ne unques executrix*, and *plene*

(a) 1 B. & A. 254.

(b) 3 T. R. 685.

(c) 2 W. Bl. 1275.

(d) 12 East, 232.

administravit, upon which last plea she obtained a verdict, would not be in a worse situation than if she had pleaded that plea only. Here had the defendants below pleaded plene administravit only, the plaintiff, who admitted the plea to be good, and consequently that there were no assets of the testator in the hands of the defendants, could never have been entitled to costs.

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Pollett, contra, was stopped by the Court.

LORD TENTERDEN C.J. I am of opinion that the judgment of the Court below must be affirmed. If the defendant had pleaded a plea of plene administravit only, the plaintiff might have taken judgment of assets quando, without incurring the costs of a trial. But the defendants by pleading that the testator never promised, compelled the plaintiff to incur those costs. It is true, that if issue had been taken on both the pleas, and the second (a bar to the action) had been found for the defendants, the rule established in ordinary cases, where any plea answering the action is found for the defendant, would have been applicable. But the plaintiff did not do that, he admitted the truth of the second plea, without putting the defendants to the expense of proving it, but was compelled to go down to trial on the other issue, in order to avail himself of the judgment of assets quando acciderint.

BAYLEY J. The case of *Edwards v. Bethel* only decided that where a plea of the general issue is found against an executor, and plene administravit for him, he is entitled to a general judgment in his favour, and to the general costs of the action. In the present case it

has

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has been contended, that an executor is never liable to costs de bonis propriis, unless he pleads a plea false to his own knowledge. But that is not the rule. In such case he is liable not only to pay the costs, but the damages also, de bonis propriis. But if he pleads a plea, although not false to his knowledge, and the plaintiff obtains a verdict, he is entitled to judgment for the whole in the first instance de bonis testatoris, and if there are not assets, then to the costs de bonis propriis of the executor.

LITTLEDALE J. I am of the same opinion. I have always understood the course in such pleadings as these to be, that the plaintiff is entitled to costs. It is right that he should not recover the debt out of the executor's property; but as the costs are incurred in consequence of the defendants having pleaded a plea which they could not support, it is right that they should pay them if they have not assets of the testator's sufficient for that purpose.

Judgment affirmed (a).

(a) *Parke J.* was sitting at Nisi Prius at Guildhall.

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In Re, and Petition of Bingham 2 G. & J. 130
Taylor v. Shattworth 6 B. & C. 277
Hemsworth v. Pridmore 1 C. & P. 131

MARSH and Others, Assignees of ROWE, a Bankrupt, against WOOD and Another.

Friday,
July 3d.

COVENANT. The declaration stated that before *Rowe* became bankrupt, by an indenture made between the defendants of the one part, and *Rowe* of the other part, (after reciting, amongst other things, that *Rowe* alleged that he was entitled to charge the defendants, or one of them, the loss, or some part or share of the loss, which had arisen to him by or in consequence of the purchase of three ships of war, called, &c., in or about the month of *November* 1814, which the said defendants wholly disputed, and that there were other differences and disputes between the defendants and *Rowe* respecting the said ships, all which differences and disputes they had agreed to refer to an arbitrator in the said indenture mentioned,) in consideration of the premises, the said parties thereto did mutually agree to stand to and abide by the award of *W. S.* of upon and concerning the said disputes and differences, &c., and that the parties should not, nor would, in any manner obstruct, hinder, or impede the said arbitrator in making an award. Breach, that defendants by deed revoked their said submission. Plea, first, non est factum; secondly, bankruptcy of *Rowe* generally before the revocation; thirdly, special plea of *Rowe's* bankruptcy, and that before any award was made

Covenant by the assignees of *A.*, a bankrupt, on articles of agreement, entered into by *A.* before his bankruptcy, and the defendants, whereby, after reciting that differences existed between the plaintiff and the defendants respecting certain ships of war purchased by the former, they bound themselves to abide by the award of *W. S.* Breach, that defendants had revoked their submission. Plea, that before any award was made, *A.* became bankrupt, and all his interest in the subject matter of the reference was assigned to the provisional assignee. Replication, that the provisional assignee assigned to the plaintiffs. Demurrer and joinder:

Held, that as the subject matter of the reference was taken out of the bankrupt, and assigned to the plaintiffs, who would not have been bound by the award, the submission was no longer mutual, and, therefore, was not binding, and the defendants, by giving notice to the arbitrator not to proceed, did not make themselves liable to an action.

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the commissioners assigned to *C. Cutten* (the provisional assignee) all claim, right, interest, or demand whatsoever of or belonging to the said *Rowe*, in or concerning all and every the matters or things in dispute or difference between him and the defendants. Demurrer to the second plea. Replication to the third plea, that after the assignment to *Cutten* the plaintiffs were duly chosen assignees of the estate and effects of *Rowe*, and *Cutten* assigned to them all and singular the goods, wares, and chattels, debts, sum and sums of money, and all other the personal estate of which *Rowe*, or any person in trust for him, was possessed or entitled to at the time of his bankruptcy. Demurrer and joinder. The case was now argued by

Follett in support of the demurrer. The question raised by this demurrer is, whether on one of two parties who have submitted disputes to arbitration becoming bankrupt, the other may revoke the submission, without being liable to an action. He may do so on two grounds: first, that the bankruptcy is of itself a revocation; secondly, if it be not, still it justifies a revocation by the other party. An award, to be good, must be made on a submission mutually binding on all the parties to be affected by the award, and between whom the differences exist. If there is no such submission, the award is void, whether it be made against a party bound or not, *Dilly v. Polhill* (a), *Biddell v. Douse* (b). In other cases it has been held, that in order to recover on an award, evidence must be given that all the parties to it were bound, *Farrer v. Owen* (c). And

(a) 2 Str. 923.

(b) 6 B. & C. 255.

(c) 7 B. & C. 427.

If after a sufficient submission any thing occurs which may prevent the enforcing the award against either of the parties, the submission is at an end, whether the thing so happening arises by the act of God, the act of the party, or the operation of law. Thus death is a revocation, and so is marriage after a submission by a feme sole, *Roll. Abr. Authority* (B.), *Sir W. Jones*, 388., *Charnley v. Winstanley* (a), *Saccum v. Norton* (b). Those decisions must have proceeded on the ground that the party had lost all control over the subject-matter of the award, and therefore could not perform it, or that the party was not bound to perform it. The first reason applies as well to cases of bankruptcy as of marriage. The bankrupt has no longer any power over the subject-matter of the submission, and the award is not binding on the assignees, *Ex parte Kemshead* (c). [Bayley J. Suppose an award were made that the bankrupt had no claim, would the assignees be bound?] According to the case cited, they would not if the award were made after the bankruptcy. Again, a submission to arbitration is merely an authority given to arbitrators, *Vynior's case* (d), and is revokable. [Lord Tenterden C. J. In ordinary cases, although the submission may be revoked, yet the party is liable to an action.] A letter of attorney to make a feoffment is revoked by death or marriage, and it seems by bankruptcy also, for it has been held that a power of attorney to receive money is revoked by bankruptcy, *Hovill v. Lethwaite* (e), *Hudson v. Granger* (g). Here the bankrupt before his bankruptcy gave the arbitrator a certain power over his property, the power of the

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(a) 5 East, 266.

(b) 2 Keb. 865.

(c) 1 Rose, 149.

(d) 8 Co. 159.

(e) 5 Esp. 158.

(g) 5 B. & A. 27.

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principal over his property was terminated by his bankruptcy, and the power delegated to the arbitrators was determined by the same event. Secondly, if the bankruptcy was not an actual revocation, still if the award, when made, would be nugatory, the other party might lawfully revoke his submission. *Andrews v. Palmer* (a) will be relied on as an authority against this, but this case differs, for there a suit was referred by order of Nisi Prius, a verdict was taken subject to an award, which when made spoke from the time when the verdict was entered; but here there was no suit to be referred. Thirdly, the assignees cannot sue for a breach of this contract, the breach having been committed after the bankruptcy, and the assignees not being bound by the contract. There is nothing in the statute relating to bankruptcy, or in the assignment, which can give such a right of action to the assignees. It is not to recover the property, or a debt of the bankrupt, and therefore differs from the case of *Smith v. Coffin* (b), where it was held that the right to maintain a real action passed by the assignment.

R. V. Richards contra. It may be admitted, that a mutually binding submission to arbitration is necessary in order to give authority to the arbitrators, it may be admitted also, that marriage or death is a revocation of a submission; but the question here, is, whether the bankruptcy of *Rowe* operated as a revocation of the authority given to the arbitrator, or whether it enabled the other party to revoke that authority without exposing him to an action. When a feme sole, by marry-

(a) 4 B. & A. 250.

(b) 2 H. Bl. 444.

ing, revokes the authority before given to an arbitrator, that gives a right of action against her and her husband, *Charnley v. Winstanley* (a), because the revocation is by an act of the party. No such right of action accrues where the revocation is by death or by the act of God. Revocation by bankruptcy differs from those cases. It is in the nature of a criminal proceeding in invitum. If the Court hold that a party by becoming bankrupt revokes, they must hold that he will become liable to an action of covenant for the breach of his covenant, by a thing done against his will. The case has been argued on the other side, on the ground of the bankruptcy operating as a revocation, on account of the bankrupt losing all control over his property. But that very point was under the consideration of the Court in *Andrews v. Palmer* (b), and it was there decided, that the bankruptcy of the plaintiff did not operate as a revocation of the submission, that it would not put an end to the suit which the bankrupt had instituted, and therefore could not put an end to the arbitration founded upon that suit. The reference there, it is true, was by order of nisi prius, but that order being made by consent of the parties, was like any other agreement to refer. In *Haswell v. Thorogood* (c) a cause was referred, and the arbitrator awarded a sum of money to be paid by the plaintiff to the defendant; between the time of making the order of reference, and taxing costs, and entering up judgment, the plaintiff became bankrupt; but the Court, nevertheless, granted an attachment against him for non-payment of the costs. Had the bankruptcy been considered a revocation of the submission that attachment

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(a) 5 East, 266.

(b) 4 B. & A. 250.

(c) 7 B. & C. 705.

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could not have been granted. This, at most, is only like the case of a man assigning all his property after he has entered into a submission to arbitration, but that clearly would not be a revocation.

LORD TENTERDEN C. J. It appears by the record in this case, that the disputes referred to arbitration were respecting certain ships purchased by the bankrupt. After the submission to arbitration, and after some proceedings had been taken before the arbitrator, the expense of which the plaintiffs seek to recover in this action, *Rowe* became bankrupt, and all his claim interest, or demand, in or concerning the matters in dispute, was assigned first to the provisional assignee and then to the plaintiffs. Then the defendants revoked their submission. It does not appear necessary to decide that bankruptcy in general revokes a submission to arbitration; for, in this case, it appears on the record that all the bankrupt's interest in the matters in dispute had passed to the assignees, and they clearly would not have been bound by the award of the arbitrator. The defendants, therefore, ought not to be bound. It is clear upon the authorities quoted at the bar, that if the original submission does not bind all the parties, it does not bind any. If, then, a submission not originally binding all is void, we must say as a rational consequence that, if by matter *ex post facto*, a submission becomes ineffectual as to one party, it must be altogether void. I am therefore of opinion, that the defendants were justified in giving the arbitrator notice not to proceed, and that the present action is not maintainable.

BAYLEY

BAYLEY J. The object of a reference is to bring about a final settlement of the matters in dispute; and if the bankruptcy of one party prevents the arbitration from bringing the disputes to a final end, the other party may lawfully put a stop to the arbitration. Here *Rowe's* claims were referred, then he became bankrupt and those claims were transferred to his assignees, who were not bound by the submission. The arbitrator could not go on to any good purpose, the defendants could derive no benefit from the reference, and might therefore put an end to it.

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LITTLEDALE J. It is of the very essence of an arbitration that the submission should be mutual, and that the award should be mutual and final. Here, although the submission was at first mutual, it did not continue so, but an assignment was made of *Rowe's* claims, which destroyed the mutuality. Neither would the award have been mutual if made, it would, as to one side, have been quite ineffectual, and this change was the effect of *Rowe's* bankruptcy. The defendants were therefore justified in putting an end to the arbitration. The case may, perhaps, be compared to a condition, the non-performance of which is excused if it be occasioned by the default of the other party. Upon the whole, therefore, I agree that our judgment on the demurrer must be for the defendants.

Judgment for the defendants.

Friday.
July 3d.

**DOWBIGGIN, Administratrix of JOHN DOWBIGGIN,
against HARRISON.**

Plaintiff sued as administratrix, upon promises to the intestate, and upon an account stated with her as administratrix of monies due to her in that character, and a promise to pay her: Held, that it thereby appeared that the contract was one made between the plaintiff and another person within the words of the stat. 28 Hen. 8. c. 15., and, therefore, that after a nonsuit, the defendant was entitled to costs.

ASSUMPSIT. The first five counts of the declaration were on promises made to the intestate in his lifetime. The sixth count was as follows, That the defendant heretofore, to wit, on the 1st of *October* 1826, to wit, at, &c. accounted with the said plaintiff, as administratrix as aforesaid, of and concerning divers sums of money from the defendant to the plaintiff as administratrix as aforesaid, before that time due and owing, and then in arrear and unpaid, and upon that accounting the defendant was found to be in arrear and indebted to the plaintiff, as administratrix, in the sum of 5000*l.*; and being so found in arrear and indebted, he, the defendant, in consideration thereof, afterwards, to wit, on, &c. promised the plaintiff as administratrix, to pay to her the sum of money last mentioned, when he, the defendant, should be requested. Plea, general issue. At the trial before Lord *Tenterden* C. J., at the sittings after *Michaelmas* term 1827, the plaintiff was nonsuited. The defendant's attorney gave notice to tax the costs in *Michaelmas* term 1828, when the Master refused to allow the defendant any costs. A rule nisi having been obtained by *Campbell*, for the Master to tax the defendant his costs on the authority of *Jones v. Jones (a)*,

(a) 1 *Bing*. 249.

The

The *Attorney-General*, *Brougham*, and *Godson* now shewed cause. The grounds on which executors and administrators have been held to be exempt from costs where a nonsuit or verdict has passed against them, have not been uniform. The reason assigned for such exemption sometimes has been that the sum, if recovered, would be assets; at others, that executors or administrators must be supposed ignorant as to the property of the deceased, *Cockerill v. Kynaston* (a), *Cowell v. Watts* (b). The true rule, however, is, that executors and administrators are not liable to costs upon a nonsuit or verdict where they necessarily sue in their representative character, and cannot bring the action in their own right, as upon a contract entered into with the testator in his lifetime, *Bull v. Palmer* (c), *Portman v. Cane* (d), *Cook v. Lucas* (e), or for a wrong done in his lifetime. But where the cause of action accrues after the death of the testator, and the plaintiff may sue thereon in his own right, he is not to be excused from the payment of costs, though he bring his action as executor or administrator, *Cooke v. Lucas*; or in trover for a conversion after the death of the testator. Then the only question is, whether it appears on the face of the declaration, that the plaintiff necessarily sued in her representative character on the contract stated in the sixth count. That depends upon the fact, whether the consideration for the promise was a debt which accrued due to the intestate in his lifetime, or to the plaintiff after his death. The reasonable presumption is, that the accounting, which is alleged to have been with the plaintiff as admi-

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 against
 HARRISON.

(a) 4 T. R. 277.

(b) 6 East, 405.

(c) Sir T. Jones, 47.

(d) 2 Ld. Raym. 1413.

(e) 2 East, 395.

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nistratrix, was in respect of sums due to the intestate in his lifetime, *Wilton v. Hamilton* (a). The sixth count does not therefore shew a cause of action which accrued after the death of the intestate. It shews only that a promise was made after his death, but not that the consideration for that promise moved from the plaintiff to the defendant. The promise and the consideration together constitute a contract binding in law. And if the consideration was one moving from the intestate in his lifetime to the defendant, then the contract declared on was one in respect of which the plaintiff necessarily declared in her representative character.

Campbell, contra, was stopped by the Court.

Lord TENTERDEN C. J. By the 23 H. 8. c. 15. it is enacted, "that if any person commence or sue any action, bill, or plaint of debt or covenant upon any specialty made to the plaintiff, or upon any contract supposed to be made between the plaintiff and any other person; and the plaintiff, after appearance of the defendant, be nonsuited, or a verdict pass against him, the defendant shall have judgment to recover his costs against the plaintiff." Now here the sixth count alleges that the defendant accounted with the said plaintiff as administratrix of and concerning divers sums of money from the defendant to the plaintiff, as administratrix, before that time due and owing and then in arrear and unpaid, and upon that accounting the defendant was found to be indebted to the plaintiff, as administratrix, in the sum of 5000*l.*; and being so indebted, in consideration

(a) 1 B. & P. 445.

thereof,

thereof, promised the plaintiff, as administratrix, to pay to her that sum upon request." If we are to consider the promise as the contract made between the plaintiff and defendant, then it is a case within the very words of the act of parliament. If we are to look to the consideration as part of the contract, I cannot say that the consideration may not have moved from the plaintiff to the defendant. Suppose that goods belonging to the intestate had been sold by the plaintiff to the defendant after the death of the intestate, she might sue as administratrix for the price of the goods. So, if the defendant after the death of the intestate, had received money belonging to his estate, she might sue for that money as administratrix, and she, as administratrix, might account with the defendant respecting such monies; and the consideration for the promise implied by law from such accounting would move from the plaintiff to the defendant. If that be so, then it seems to me that the sixth count states a contract (within the very words of the statute) made between the plaintiff and the defendant.

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BAYLEY J. In *Tattersall v. Groote* (a), Lord Eldon, speaking of the statute 23 H. 8. c. 15., says, "Attending to the language of that act, perhaps we may be authorized to say, that the sound principle on which the exemption of executors and administrators rests, is not the degree of ignorance under which they may be supposed to lie, but that the exemption founds itself on the description of the actions contained in the statute in which costs are to be paid. The words of the statute are, "any

(a) 2 Bos. & Pul. 255.

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action, bill, or plaint of debt, or covenant upon any specialty made to the plaintiff or plaintiffs, or upon any contract supposed to be made between the plaintiff and any other person." The 4 Jac. 1. c. 3. does not carry the matter further. The exposition of the early cases seems to be, that if the contract be not made with the executor or administrator, but with the testator or intestate whom they represent, then it is not an action upon a contract supposed to be made with the plaintiff and any other person in the language of the act." That applies to the present case. The sixth count states a contract made with the administratrix.

PARKE J. There is certainly a discrepancy between the cases on this subject. But looking at the words of the statute instead of the decided cases, there can be no doubt that the contract stated in the sixth count was one made between the plaintiff and another person within the very words of the statute 23 Hen. 8. c. 15. The defendant is, therefore, entitled to his costs. The Master will distinguish between the counts in which the plaintiff sues on promises to the intestate, and those in which she sues on her own right.

Rule absolute (a).

The Master allowed the defendant the costs upon the sixth count only, and reduced the amount claimed by him nearly one half.

(a) See the cases of *Jones, Administrator, v. Williams*, 6 M. & S. 178.; *Zakariah v. Page*, 1 B. & A. 386.; *Barnard v. Higden*, 3 B. & A. 213.; *Partridge v. Court*, 5 Price, 412.

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THE declaration stated that the defendants, on a day therein named, and on divers other days and times between that day and the commencement of the

Trespass for breaking and entering the plaintiff's close and treading down the grass,

&c., and breaking and destroying the hedges and fences of the plaintiff, &c. The defendant, as to all the trespasses, pleaded that the plaintiff's close was parcel of the manor of C., and that a certain messuage, and four acres of land, with the appurtenances, at the said several times when, &c. were, and from time immemorial had been, within and parcel of the said manor, and a customary tenement, of that manor; and that within the said manor there was, and from time whereof, &c. there had been an ancient custom that every customary tenant of the said customary tenement, with the appurtenances, should have common of pasture upon the plaintiff's close. That J. S., being seised of the said customary tenement, having occasion to use his common of pasture, entered the close in which, &c., and put his cattle in, and because the hedges and fences had been improperly erected, threw them down. Replication, denying the custom for the customary tenant of the said customary tenement to have common of pasture, upon which issue was joined. Plea second, a prescriptive right of common of turbary in respect of said customary tenement, consisting of a messuage and land. Replication, denying the custom in respect of such said customary tenement, upon which issue was joined, and new assignment, that the defendant entered for other purposes than those mentioned in the plea. It appeared in evidence, that at the time of the plea pleaded, there was an ancient customary tenement, consisting of a dwelling-house and out-buildings, garden, and a small quantity of land, the customary tenant whereof had immemorially enjoyed such common of pasture in the plea mentioned; that for many years this defendant had been such customary tenant, and in 1812 had built a new dwelling-house on a part of the garden; that both the old and new dwelling-house continued to be occupied until 1823, when the former fell into decay, and was abandoned by the tenant, and then remained unoccupied until it was finally pulled down in 1825, from which time there had been no dwelling-house on the tenement, except the one built by the defendant in 1821. During the years in which both the old and new dwelling-houses were occupied, the tenant of the former continued to exercise such customary rights on the wastes of the manor in respect thereof as he had before, and during that period it did not appear that the occupier of the latter had exercised any customary rights on the wastes of the manor in respect thereof, but since the new dwelling-house had been alone occupied, the customary tenant of the tenement had claimed and enjoyed all the same rights in respect thereof as had been claimed and enjoyed at any former period, and among others, the customary right stated in the second plea: Held, that upon this evidence, the defendant was entitled to have the issue joined upon the right of common of pasture found for him in respect of an ancient customary tenement.

It appeared that the defendants committed one trespass by breaking down a large portion of the fence which was standing upon the plaintiff's close, which the plaintiff had then newly erected upon the common, and that the defendants did so, really intending to assert and preserve their rights of common of pasture and of turbary; but that they broke down much more of the fence than was necessary for the convenient ingress and egress of men and commonable cattle, into and upon that part of the close which was inclosed by the fence, and that they did not intend, at the time of committing the trespass, to exercise any of the said rights of common, nor had they with them any commonable cattle: Held, that upon this evidence the defendants were entitled to have the issue found for them, upon the plea of "not guilty" to the new assignment.

Quare, Whether the defendants were entitled to have the issue on the right of common of turbary found for them.

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suit, broke and entered a certain close of the plaintiff, and forced and broke open, broke to pieces, damaged, and spoiled, divers gates of the plaintiff on the said close, and the locks, staples, and hinges, respectively affixed to the same; and that they trampled upon, consumed, and spoiled, the grass of the plaintiff growing in the said close, and broke down, prostrated, and destroyed, a great part of the hedges and fences of the plaintiff there standing and being; and threw large quantities of earth, stones, and rubbish, into and upon the said close. Second count, that the defendants on the same day and year, afterwards seized, took, and carried away, divers large quantities of earth, stones, and wood, of the plaintiff, and converted and disposed thereof to their own use. Plea first, not guilty. Issue was joined on the said plea. Plea second, as to all the said trespasses in the first count, that the said close, before and at the said several times, where, &c. was within and parcel of the manor and hundred of *Crondall* in the said county, and that *a certain messuage and divers, to wit, four acres of land, with the appurtenances*, situate in the tything and parish of *Yateley*, at the said several times, when, &c. were, and from time immemorial, had been within and parcel of the said manor and hundred, *and a customary tenement of that manor*, demised and demiseable by copy of the court rolls of the said manor, by the lords of the said manor and hundred, or by their steward of the court of the same manor for the time being, to any person or persons willing to take the same in fee simple, at the will of the lord of the said manor for the time being, according to the custom of the said manor. And that within the said manor there was, and from time whereof the memory of man was not to the contrary, there

there had been a certain ancient and laudable custom there used and approved of, that is to say, that all and every the customary tenant and customary tenants of of the said customary tenement, with the appurtenances for the time being, from time whereof the memory of man is not to the contrary, have, and each of them hath had and have, and each of them hath used, and been accustomed to have, and of right ought to have had, and still of right ought to have, for himself and themselves, his and their farmers, occupiers of such customary tenements, with the appurtenances, for the time being, common of pasture in, upon, and throughout the said close, in which, &c. ; for all their commonable cattle, levant and couchant, in and upon the same customary tenement, with the appurtenances, every year, at all times of the year, at his and their free will and pleasure, as belonging and appertaining to such customary tenement. And the defendants in their said second plea, then in due form alleged the admission of the defendant *John Shefford* long before any of the said times, when, &c. to the said customary tenement, his entry thereon, and seisin thereof in fee, and that at the several times, when, &c. he was in the actual occupation thereof, and entitled to such common of pasture as therein aforesaid ; and that, therefore, the said *John Shefford* at the said several times, when, &c. having occasion to use his common of pasture, in his own right, and the said other defendants as his servants, and by his command, at the said several times, when, &c. entered the said close in which, &c. in order to put, and did then and there put into and upon the same his cattle, being said *John Shefford's* commonable cattle, levant and couchant, in and upon the said customary tenement to use the said common of pasture ; and in so doing, and in the removal

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removal of obstructions to the enjoyment of the said right of common, they had necessarily committed certain acts which they averred to be the same supposed trespasses specified in the introductory part of the plea, and complained of by the plaintiff in the first count of his declaration. To this plea the plaintiff replied, that at the said several times, when, &c. there was not within the said manor, nor had there been from time whereof the memory of man is not to the contrary, the said custom in the said plea mentioned, there used and approved of, (setting out the same in the same terms in which the defendants had pleaded it in their plea). Upon which plea and replication; the second issue was joined between the parties. The defendants, as to all the trespasses in the declaration, except as to the taking and carrying away the earth and stones in the last count mentioned, and converting and disposing thereof to their own use; pleaded thirdly, as to the said close, in which, &c. and the said messuage and land, precisely as in the second plea above stated, and then alleged a custom (in the usual form) within the manor, that all and every the customary tenants of the customary tenement, &c. and their servants, &c. should have common of turbary in, upon, and throughout the said close, in which, &c. to cut, dig, and take turf, in and upon the said close, and to carry away the same for necessary fuel, to be spent, burnt, and consumed, in and upon the said messuage, with the appurtenances, every year, and at all times of the year, as occasion hath required, as to the said customary tenement and messuage, with the appurtenances belonging and appertaining. The plea then alleged the admission of the defendant, his entry and seisin, and then justified the trespasses for the purpose of using the common of turbary, as in the second plea. The plaintiff in his replication denied the

the custom, and upon that plea and replication issue was joined. The plaintiff newly assigned, that he brought his action, not only for the trespasses in the introductory parts of the second and third pleas mentioned, but also for that the defendants on the said days and times in the declaration mentioned, on other occasions and for other purposes than those in the said pleas respectively mentioned, and in a greater degree and to a greater extent, and with more force and violence than was necessary for abating the said supposed obstructions in the said pleas respectively mentioned, committed the said trespasses in the introductory parts of those pleas respectively mentioned. And also for that, the defendants on the days and times in the declaration mentioned, with force and arms, &c. broke and entered the said close of the plaintiff, in the declaration mentioned, and with their feet in walking, trod down, trampled upon, and spoiled, the grass and herbage of the plaintiff there growing, to wit, of the value aforesaid, and broke down and destroyed the said part of the hedges and fences of the plaintiff belonging to the said close, on other occasions and for other purposes than in those pleas, or any or either of them mentioned; in manner and form as the said plaintiff had above thereof complained against them the said defendants; and that the said trespasses above newly assigned, were other and different trespasses than those trespasses in those pleas, or any or either of them mentioned, and therein attempted to be justified. To this new assignment, the defendants pleaded not guilty; upon which issue was joined.

At nisi prius a verdict was found for the plaintiff subject to the award of a barrister, with power to him to order a nonsuit to be returned on the back of the record,

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record, in case he should award in favour of the defendants. He, by his award, after setting out the pleadings as above mentioned, stated as follows:— First, I find, that the defendants were not guilty of the trespasses, except as to such of the same as were confessed and specified in the introductory parts of the second and third pleas hereinafter particularly specified; and that the several acts were proved to have been committed on the same day, the 7th of *March* 1826, at the same time and on the same occasion, in the manner and under the circumstances hereinafter particularly specified.

I find the second issue in favour of the defendants. And as to the facts relating thereto, I find, that within and parcel of the said manor, long before and on the 7th day of *March* 1826, and at the time of the plea pleaded, there was an ancient customary tenement consisting of a dwelling house and outbuildings, garden, and small quantity of land, the customary tenant whereof had immemorially enjoyed in respect thereof, such common of pasture as in the said plea mentioned, and also generally through the wastes of the said manor, of which the said close, in which, &c. until the grant and inclosure hereinafter mentioned, had been parcel. That for many years the defendant, *John Shefford*, had been such customary tenant, and in 1812, when the dwelling-house and garden were leased to and in the occupation of *Thomas Copperthwaite*, had built a new dwelling-house on a part of the garden by the sufferance of the said *Thomas Copperthwaite*; that both the old and new dwelling-house continued to be occupied till the year 1829, when the former fell into decay, was abandoned by the tenant, and then remained unoccupied until it was finally pulled down in 1825, from which time there
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had been no dwelling-house on the said tenement, except the one built by *John Sheppard* in 1812. During the years in which both the old and new dwelling-houses were unoccupied, the tenant of the former continued to exercise such customary rights on the wastes of the manor in respect thereof as he had before, and during that period it did not appear that the occupier of the latter had exercised any customary rights on the wastes of the manor in respect thereof. But since the new dwelling-house had been alone occupied, the customary tenant of the tenement had claimed and enjoyed all the same rights in respect thereof as had been claimed and enjoyed at any former period, and among others the customary right stated in the second plea.

And I further find, that on the 31st of *October* 1826, the Dean and Chapter of *Winchester*, lords of the said manor, granted by the rod to the plaintiff the close in which, &c. being at that time parcel of the waste of the manor, to hold to him, his heirs and assigns for ever, according to the custom of the said manor, at a certain yearly rent, and all other burthens and services; and that the plaintiff paid a fine of 8*l.* and was admitted tenant; and that the inclosure of the said close was made by the said plaintiff in pursuance of and claiming under this grant, which inclosure was duly presented as an encroachment at the next annual court of the manor held, in *October* 1826. In support of the validity of this grant, the counsel for the plaintiff produced a great deal of evidence, which they contended proved the existence of an immemorial custom for the lord of the said manor for the time being, of his own free will, and without the consent of the homagers as a necessary condition, but in open court, to grant parcels of the waste in severalty to be held by copy of court roll according to the custom of the manor.

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And I find and declare that no such custom was proved. They also contended, that if the consent of the homagers was essential to such custom, either in law or in fact as part of the same, presuming the same to have existed, such consent was proved to have been given in the case of the grant above mentioned to the plaintiff. And I find and declare, that such grant was made without any consent or acquiescence therein of the said homagers. The counsel for the plaintiff then produced evidence to shew, that the wastes of the manor remaining uninclosed after the said grant to the plaintiff furnished sufficient common of pasture, to satisfy the rights of all the tenants of the manor having commonable rights of pasture on such wastes, and contradictory evidence was produced on this point on the part of the defendants. And I find and declare that it was not proved that there was such sufficiency as last above mentioned.

I find the third issue in favour of the defendants; and, as applicable to this issue, I find all the same facts already stated in relation to the said tenement, the old and new dwelling-house thereon, and the exercise of rights in respect thereof, and also in relation to the grant of the 31st of *October* 1825 to the plaintiff, the inclosure under the same, and the alleged custom or customs; and also that it was not proved that there was a sufficiency of common of turbary left upon the wastes of the manor remaining uninclosed after the said inclosure by the plaintiff, to satisfy the rights of all the tenants of the manor having commonable rights of turbary on such wastes, &c.

And as to the new assignment, I find that the defendants were not guilty of the trespasses so newly assigned, or any of them, or any part thereof. And as to all the facts relating to that issue, I find that the defendants,

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on the 7th day of *March* 1826, being the only day on which any trespasses were proved, committed one trespass by breaking down a large portion of the fence which was then standing upon the said close, in which, &c. and which the said plaintiff had then newly erected as the inclosure of the said close, in which, &c.; that they did so, really intending thereby to assert and preserve the commonable rights of pasture and turbary of the defendant, *John Shefford*, particularly set out in the second and third pleas, over and upon the said close, in which, &c. the said *John Shefford*, then being lawfully entitled to such rights, whether the exercise of them or either of them was or was not suspended in law by reason of any of the facts hereinbefore found by me; but that, upon the occasion of committing the said trespasses, they broke down much more of the said fence than was necessary for the convenient ingress and egress of men or commonable cattle into and upon that part of the said close in which, &c., which was inclosed by the said fence, or for the convenient cutting or carrying away of turf from the said part of the said close; and that they did not intend to exercise any of the said rights of common at the time of committing such trespass, nor had they with them any commonable cattle, nor any instrument for the cutting of turf, nor did they, in fact, then or before the commencement of the said action, turn on any commonable cattle thereon, or cut, dig, or take away any turf for fuel therefrom; and that by the said trespasses they did damage to the plaintiff to the amount of 10s., at which sum I assess the damages of the plaintiff upon the said new assignment, if it shall appear to the Court that the plaintiff is entitled to a verdict thereon by the facts stated by me in regard thereto. And I do further award and order, that the

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said verdict shall be vacated, and a nonsuit shall be returned on the back of the record; and that the associate shall deliver the postea to the attorney of the said defendants, for him to sign judgment and to tax his costs thereon.

A rule nisi was obtained for setting aside this award, upon the ground that, upon the facts stated on the award, the issues on the second and third pleas, and on the plea of not guilty to the new assignment, should have been found for the plaintiff.

The *Attorney-General*, *Selwyn*, and *Serjt. E. Lawes*, on a former day in this term, shewed cause. The defendants proved the issues joined on the special pleas, and the award is therefore right. The defendant claims by the second plea a prescriptive right of common of pasture, in respect of an ancient customary tenement, in the early part of the plea averred to be a messuage and four acres of land. The defendants, therefore, were bound to prove that there was, at the time when the trespasses were committed, an ancient customary tenement consisting of a messuage and land. The arbitrator was of opinion that they had proved that allegation; but he has stated the facts specially, in order that the opinion of the Court might be taken, whether he had formed a correct judgment on that point. He has found, that at the time when the trespasses were committed, there was an ancient customary tenement, consisting of a dwelling-house and outbuilding, garden, and small quantity of land, in respect of which the tenant had exercised a right of common of pasture over the locus in quo. Now, if the award had stopped here, it is quite clear that the issue would have been proved literally. But it is further stated that the dwelling-house, existing at the time when
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the trespasses were committed, had been built in 1812, and that the old one had been pulled down in 1825. That fact does not disprove the allegation in the plea, that there was an ancient customary tenement consisting of a messuage and land. According to the *Termes de la Ley* (a), the word messuage is derived from the French word maison, or mansion, which is no other but a place of abiding or habitation, and yet (it is there said) messuage in our law contains more than the very place of habitation; for a house and a messuage differ, in that a house cannot be intended other than the matter of building, but a messuage shall be said, all the mansion place, and the curtelage shall be taken as parcel of the messuage, 20 H. 7. *Keilway, fol. 57 a.*; and by the name of a messuage the garden and curtelage shall pass, *Plowden, fol. 171 a.* The pulling down, therefore, of one house and erecting another in its stead, even on a different site, would not destroy the customary tenement, that is, the messuage and land, to which the right of common was appurtenant. Besides, the fact of a dwelling-house (which constitutes a messuage in part) not being an ancient building, is, with reference to the right of common of pasture, wholly immaterial. The right of the tenant to turn on the waste is measured by the number of cattle levant and couchant on his land, that number which the land is capable of supporting in winter. Now, if the tenant builds on the land in respect of which he has his right of common of pasture, he thereby diminishes the quantity of land capable of supporting commonable cattle in winter, and consequently the number of cattle entitled to depasture on the land, so that the lord will be thereby benefited, rather

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(a) p. 202.

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than otherwise. Where, therefore, common of pasture is claimed by custom, and issue is joined on the custom, although the antiquity of the messuage may be involved in the issue, the antiquity of the building or habitation which constitutes the messuage in part is not involved in it; it being wholly immaterial, with reference to the lord or tenant, whether the building be an ancient or a modern one, — the right of the tenant depending upon the number of cattle levant and couchant upon his land, and not in any degree upon the nature of his building or habitation. It is certainly stated in *Viner's Abr.* tit. *Common*; (M) 11: that houses newly erected cannot have right of common where it is claimed by prescription, and for that *Costard v. Wingfield*, Trin. 30 Eliz. is cited. That case is reported in *Owen*, 4. (a); *Godbolt*, 96. pl. 110.; *Anderson*, 151. pl. 200.; *Goldesborough*, 38. pl. 13.; *Seville*, 81.; 2 *Leonard*, 44. The plaintiff declared in replevin; the defendant avowed taking the plaintiff's cattle, damage feasant. The plaintiff pleaded in bar, that D. was an ancient town, and that all the inhabitants within the said town (except the parson, infants, and the inhabitants of some particular houses) have used to have common of pasture for all cattle levant and couchant within the said town. The defendant replied, that the house, in respect of which common was claimed, was built within thirty years last past, and that before that time there had not been any house there: and, upon demurrer, the question was, whether he should have common in respect of this new erected house; and according to the report in *Owen*, 4., all the justices agreed that it was impossible to have a common time out of mind for a house that

(a) By the name of *Wakefield v. Cassand*.

was builded within the thirty years. According to report in *Leonard, Shuttleworth*, arguendo, put this: "If the house of a freeholder which hath used to such common doth fall down, and he erecteth a house in another place of the land, he shall have mon to that new erected house as before." It appears too, by the report in *Saville*, that a fact which exists in this case was there expressly negatived; for it is there stated that no other house was built in the said place, or thereof, before the said thirty years; and according to that report the judgment was, that the custom should not extend to new houses erected within the time *where no house was ever built before*. It does not, therefore, follow from that decision, that the custom would not extend to a case where, an old house having fallen into decay, a new house was erected.

As to the pleas of common of turbary, inasmuch as turbary can be claimed only in respect of a house, there is greater difficulty. If the lord be prejudiced by the substitution of the new house for the old one, it would seem to follow that the right of turbary may be suspended. *Luttrell's case* (a) is an authority to shew, that if a man has estovers either by grant or prescription to his house he may make alterations in the house without destroying the prescription, provided no prejudice accrue to the owner of the wood; and that he may even build new chimneys, or make an addition to his house; but he cannot employ or spend estovers in the new chimneys, or in the part newly added. Now here it is not found that the new house was such as to require more fuel than the old one, and, therefore, it does not appear that the lord would be prejudiced by it. Besides, according to *Luttrell's*

(a) 4 Coke, 87.

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case (a), where a man has any thing appendant or appurtenant to a house or mill, the most perdurable part of it is the land in which the foundation is, and upon which the whole fabric of it consists; and the prescription or grant shall respect the most durable part, which in judgment of law includes the whole. Then, in this case, the land is the most perdurable part, and the prescription respects the land. At all events, the pulling down of the ancient building did not destroy, but at most only suspended, the exercise of the right of common of pasture or of turbary. The defendants might at any time have revived that right, by rebuilding a house upon the same site and of the same dimensions as the old one. Now, here the plaintiff, by his replication, has taken issue upon the existence of the ancient right, and not upon the exercise of it at a particular time. If he had intended to rely upon the fact of the house then in existence not being an ancient house, he ought to have rejoined that fact specially. The right was only suspended, not destroyed.

As to the question on the new assignment, it was decided upon the former argument (b), that when the lord or his grantee erects fences upon the common, the commoner may, by law, destroy them; and that the fact of the defendant's having entered upon the plaintiff's close and thrown down the whole of the fences which he had erected, when they might have entered upon the close without throwing down any part of the fences, was not evidence that they entered for other purposes than those mentioned in the plea, and did not warrant the jury in finding a verdict for the plaintiff on the new assignment.

(a) 4 Coke, 87.

(b) 7 B. & C. 346.

Follett contra. The plaintiff is entitled to the verdict on the issues joined on the pleas claiming rights of common of pasture and of turbary. And if not, he is at all events entitled to a verdict on the new assignment. To support the issue of a customary right of common of turbary, appertaining to an ancient *copyhold* messuage, for fuel to be consumed upon such messuage, the antiquity of the messuage is an essential part of the issue, *Dunstan v. Tresider* (a). So it is in the case of a prescriptive right of way claimed in respect of an ancient freehold messuage, *Stott v. Stott* (b); because, if the commencement of the messuage be shewn, the prescription is gone. To support the pleas, the defendants were bound, therefore, to shew that they had the right there claimed in respect of an ancient copyhold messuage at the time when the trespasses were committed, *Arlett v. Ellis* (c). If, in trespass, a prescriptive right of common be pleaded, and issue taken on the prescription, and it be shewn that before the trespasses were committed the right was released, the prescription must be found against the defendant, *Rotherham v. Green* (d), *Davison v. Gill* (e). If, therefore, there was not, at the time when the trespasses were committed, an ancient messuage in existence to which the right was appurtenant, the defendants have not proved their plea. It appears, by the facts found by the arbitrator, that, at the time when the trespasses were committed, there was not any ancient copyhold messuage to which the right of common of turbary appertained. There was no dwelling-house except that built in 1812; and from the time when the old house was destroyed, the occupiers of the new

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(a) 5 T. R. 2.

(b) 16 East, 343.

(c) 7 B. & C. 346.

(d) Cro. Eliz. 593.

(e) 1 East, 64.

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house claimed the right of common, conceiving that they had a right so to do, on the ground that the new house was substituted for the old. But a right of this sort cannot be *transferred* to a new house. In *Fitz. N. B.* 182. it is laid down, that "if a man has common of estovers by grant, he cannot build a new house and have common of estovers for that house." If an old house, in respect of which common of estovers has been granted, becomes ruinous, it may be repaired, or if it fall down, it may be rebuilt, and the right is not destroyed; but it must be rebuilt on the same foundation, and must correspond in size and description with the ancient house of which it is supposed to be the continuance, otherwise the grantor of the right of common would be injured, because the quantity of fuel required for the new house might differ materially from that required for the old. If the house be repaired, it is a continuance of the old house; if it be rebuilt on the same site, the new house is a substitution for the old one. In a trial at bar between *Bryers* and *Lake* (a), in an action of trespass for cutting down and carrying away wood, and the defendant justifying as a commoner for estovers, it was said, that if an ancient cottage which had common be fallen down, and another cottage is erected in the place where the old cottage stood, this is no new cottage, but it may claim common as an ancient cottage by prescription." *Luttrell's* case shews that the prescription for common of estovers is not destroyed by altering the qualities of the rooms, provided no prejudice be done to the owner of the land, or by building new chimneys; but estovers cannot be spent in the new chimneys. In *Cowper v. Andrews* (b) Lord Chief Justice

(a) *Styles*, 446.(b) *Hob.* 39.

Hobart says, "if a man have common of estovers to his house, and suffer his house to fall down, he can now claim no estovers; and if he sue for it, and the other plead that his house is down, he shall not have judgment with a cessing of execution till he have re-edified his house." As in a warrantia chartæ or a writ of mesne, where the defendant pleads that he is not sued nor distrained, he shall have judgment, but no execution for the present. So in a writ of dower against the heir, if he plead that the demandant detains the evidence, he shall have judgment presently, with a cesset executio. But in the case of estovers, the plaintiff shall be barred, *for at the time of the action brought he hath no right of estovers*, but it is in suspense; and therefore it is not a perpetual but a temporal bar; and if he re-edify his house *in the same place*, he shall have his estovers again. And so, I think, if he had pulled down his house and built it again." Therefore, if the original messuage be rebuilt on the same site, the right to the turbary for the same messuage will revive; and that is quite inconsistent with the right being transferred to the new house. In this case the new house could not be a continuance of or a substitution for the old house, for the two existed at the same time; and if the right be transferred to the new house because it stands in the same garden or tenement, upon the same principle it might be transferred to twenty or thirty houses there. In *Costard and Wingfield's case* (a), it was agreed that he who set up again a new chimney where an old one was before, should have estovers to the said new chimney; and so, if he build a new house upon the foundation of an old house, that he should have common to his said house

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 Action
 against
 Heir

(a) 2 Leon. 44. Godb. 97.

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new erected. So if the house falleth down, and the tenant or inhabitant sets up a new house in *the same place*. Also, if a man hath a mill and watercourse to it time out of mind, which he hath used time out of mind to cleanse, if the mill falleth and he erecteth a new mill there, he shall have the watercourse, and liberty to cleanse it as he had before. The plea, therefore, with respect to the turbary, the right to which can only exist in respect of the house, is not supported by the proof, because the defendants have not proved that the house in respect of which they claimed a right to turbary was an ancient building.

The same objection applies to the common of pasture in the mode in which it is pleaded. The custom is, in the plea, stated to appertain to an ancient customary tenement consisting of a messuage and land. [Bayley J. The defendants have proved, that at the time of the trespasses committed, they had an ancient customary tenement consisting of a messuage and land. The fact of the building not being an ancient one does not disprove the allegation that there was an ancient customary tenement consisting of a messuage and land. The defendants have not tied themselves down by the form of the issue to prove the antiquity of the house; and, with reference to the right involved in the issue joined on the plea of common of pasture, that fact is wholly immaterial. Have they not, therefore, proven the issue in form and substance?] A custom or prescription is entire, and must be proved as laid in the plea, *Michell v. Mortimer* (a). A plea differs in this respect from a declaration, *Ricketts v. Salwey* (b). If a defendant prescribe generally for common for com-

(a) *Hob.* 209.

(b) 2 B. & A. 365.

monable cattle, the plea is not supported by evidence of a right of common for some particular species of commonable cattle only, *Morewood v. Wood* (a). So, if he prescribe for a common appendant to 300 acres in four towns, that is not supported by evidence of a right of common appendant to 200 acres in two towns, *Mitchell v. Mortimer*; and if the right be claimed in certain land, evidence that the right has been released in part of the land will defeat the prescription so laid, *Rotherham v. Green* (b). The defendant was, therefore, bound to prove, in support of the issue joined on the plea of common of pasture, that the messuage was an ancient one. But assuming that the plaintiff is not entitled to recover on the issue joined on the special pleas, he must have a verdict on the new assignment. Unless there were some other ancient messuage on the manor belonging to the defendants to which the right pleaded belonged, it was not necessary to new assign, *Stott v. Stott* (c); but if it should be necessary, there is a new assignment; and it is clear there was no ancient messuage existing at the time of the trespasses newly assigned. It is said there was only one act of trespass proved: that is immaterial, the plaintiff was not bound to prove any act of trespass to which the justification was applicable, because the defendants had confessed such a trespass by their plea. It lay upon them to prove the right; all that it was incumbent on the plaintiff to do, was to shew on the new assignment a trespass to which the justification could not be applicable, and he has done so: and it is found also that the defendants did not commit the trespass for the purposes mentioned in the pleas.

Cur. adv. vult.

(a) 4 T. R. 159.

(b) Cro. Elix. 593.

(c) 16 East, 343.

Lord

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Lord TENTERDEN C. J. now delivered the judgment of the Court; and after stating the pleadings and facts set out in the award, proceeded as follows: — The arbitrator thought, upon these facts, that the defendant was entitled to a verdict on the issues joined on the special pleas, and on the plea of not guilty to the new assignment. It was contended in argument before us, that the plaintiff was entitled to the verdict on all the issues joined on the special pleas justifying the trespasses in the exercise of rights of common of pasture and turbary, because the defendants had not proved that they had such rights in respect of an ancient customary tenement consisting of a messuage and land. We think, upon the facts stated in the award, that the defendants were entitled to have the issues joined on the custom stated in the plea justifying the trespass in the exercise of a right of common of pasture, and on the plea of not guilty to the new assignment, found for them. And if the defendants ought to have the issue joined on the plea of common of pasture found in their favour, (inasmuch as that plea applies to the whole declaration) it will justify the award of the arbitrator, who, pursuant to one of the terms of the submission, has directed that a nonsuit shall be entered on the back of the record. Under these circumstances, it becomes unnecessary for the Court to pronounce any decision as to the question raised on the plea of common of turbary. It is sufficient to say that the rule for setting aside the award must be discharged.

Rule discharged.

Ex parte BAYLEY in the Matter of HARPER.

Friday,
July 3d.

A RULE had been obtained, calling on Mr. *Harper*, the surviving partner of the firm of *Watson* and *Harper*, to refund part of a sum of 200*l.* received as a premium from *Bayley*, who had been articled to *Watson*, but acted as clerk to the two partners for about two months only, when *Watson* died. During that time each of the partners had two articulated clerks. The rule was referred to the Master, who now reported that the money had been received by *Harper*, and applied to the partnership account, and, consequently, that he was bound to refund it. It appeared by affidavit, that the money had been set off by Mr. *Harper* against Mr. *Watson's* private account; the latter being indebted 1500*l.* to him.

A party was articulated as a clerk to one of two attorneys in partnership, and paid a premium, and acted as clerk to the two partners for two months, when the attorney to whom he had been articulated died; the Court ordered the surviving partner to refund a portion of the premium, although at the time of the payment of such premium his partner was indebted to him, and the premium had been set off in account between them.

Taunton and *Whateley* now contended, that as the money had been set off in an account between *Harper* and *Watson*, the Master should be directed to review his report.

Lord TENTERDEN C. J. I am of opinion that this case is not to be decided by any strict rule of law. The Court exercises a jurisdiction over attorneys, and that is to be exercised according to law and conscience, and not by any technical rules; and considering the circumstances of this case, and the effect of the act of parliament which prohibits attorneys from having more than a certain number of clerks, we think that the rule should be confirmed. This clerk was bound

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HARPER.

in name, but in reality and in conscience he was bound to the two: he was to be instructed by the two, who were in partnership together; and they caused him to be bound to one, instead of binding him to the two, in order to satisfy the act of parliament, and enable the partners to have that number of clerks which they could not otherwise have had if *Bayley* had been bound to the two instead of one of them. In conscience, it appears to me to be a binding to the two; the premium was paid to the two; and the one being dead, and the other having the full number of clerks which the law allows him, and not being able to retain this young man in his service, and instruct him and give him the benefit for which he paid the money, I think he who is the survivor is bound to refund whatever is to be refunded. The Master has found the sum of 180*l.* is to be refunded, the young man having been there only two months; and I am not prepared to say that he is wrong. The Master's report must be confirmed.

Rule absolute.

1829.

FLINN *against* HEADLAM.*Saturday,
July 4th.*

ASSUMPSIT on a policy of insurance on ship from *Liverpool* to *Trousberg*, loss by perils of the sea. Plea, the general issue. At the trial before Lord *Tenterden* C. J., at the *London* sittings after *Trinity* term 1828, it appeared that the policy was effected in 1821 by *Corrie*, the agent of the owner, through *Headlam* and *Conway*, brokers at *Liverpool*; that the vessel sailed on the voyage insured, and was lost by perils of the sea. For the defendant, evidence was given that when *Corrie* took the order for insurance to *Headlam* and *Conway*, they observed that the ship was old, and enquired what cargo was on board. *Corrie* answered that she was old, but had been repaired, that the cargo had been insured by the charterers in the office of *B. and E.*, where he, *Conway*, might obtain further information. *Conway* then said, that if *Corrie* would get a certificate of her repair and sea-worthiness, the insurance should be effected. A certificate was obtained, stating the ship to be strong, stiff, and staunch, perfectly sea-worthy, fit to prosecute her then intended voyage, and carry a cargo of rock-salt. A clerk to *Headlam* and *Conway* swore, that he first offered the risk to *Hebson* an underwriter of great experience in *Liverpool*. That *Hebson*, on seeing the character of the ship in *Lloyd's* book, and hearing she was to carry rock-salt, said he would have nothing to do with her. The witness communicated this to *Corrie*, who answered, that she would only carry as much rock-salt as would put her in ballast trim, and that, upon this

Where the agent of a ship-owner, effecting a policy on a ship, misrepresented the nature of the cargo which she was to carry, but this was not inserted in the policy, and it did not appear that the underwriter was induced by the misrepresentation to accept the risk: Held, that the jury were warranted in finding that the misrepresentation was not material, and that it did not vitiate the policy.

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being reported to *Hebson*, he subscribed the policy. On cross-examination this witness admitted, that before the policy was subscribed, the certificate of sea-worthiness had been left at the office of *Headlam* and *Conway*. The ship sailed deeply laden with rock-salt, but it did not appear whether it was shipped before or after the representation made by *Corrie*. On this state of facts it was contended for the defendant, that the policy was void on account of the misrepresentation of *Corrie* as to the quantity of rock-salt on board the vessel. For the plaintiff it was said, that if the underwriters meant to insist upon it as part of the contract, that only a certain quantity of rock-salt should be carried in the vessel, they should have had it inserted in the policy; and that, at all events, such a representation would not affect any underwriter but *Hebson*, to whom it was made. Lord *Tenterden* observed to the jury, that it did not appear distinctly whether the representation by *Corrie* was made as to the rock-salt then actually on board, or as to that which was expected to be shipped, and he advised them to find for the defendant if they thought that a material misrepresentation was made by *Corrie* as to the quantity then on board; but to find for the plaintiff, if they thought that the representation was respecting the cargo expected to be shipped, and he desired them to say on what ground their verdict proceeded, in order that any question of law arising upon it might be argued. He observed, also, that perhaps the underwriters might be guided by the certificate of sea-worthiness, and not by the representation of *Corrie*. The jury found a verdict for the plaintiff, and said, they thought the representation was not material. In *Michaelmas* term a rule nisi for a new trial was obtained, on the ground

ground that the misrepresentation by *Corrie* was such as rendered the policy void, and that the jury ought not to have found that it was not material.

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The *Attorney-General* and *Alderson* shewed cause. The distinction between a warranty in a policy, and a representation as to some collateral matter, is well known. The former is part of the contract, and must be precisely complied with. A representation not put into the policy, has no effect unless it is fraudulent, and induces the underwriters to subscribe the policy; *Pawson v. Watson (a)*. Here, too, the representation was not made to the defendant, but to a prior underwriter. Then, as to the verdict, the jury were warranted by the evidence in finding that the representation was not as to the rock-salt then on board, but as to that which was expected to be put on board, and on that ground they might think it immaterial.

Brougham and *Patteson* contra. The distinction between a representation and a warranty is undoubted, but if there is a misrepresentation of an existing fact, that is fraudulent, and vitiates the policy. (They then argued from the evidence, that a great quantity of rock-salt must have been on board the vessel at the time when *Corrie* made the representation to *Hobson*.) The case of *Pawson v. Watson* is wholly different. There the difference between the fact, as it actually existed and as represented, was not material, and on that ground only, it was held not to affect the policy. Here the difference was very material, and the jury could not,

(a) 2 Cowp. 785.

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with any propriety, find that it was not. Their verdict, therefore, clearly proceeded upon some mistake, and ought to be set aside.

LORD TENTERDEN C. J. It is certainly very desirable, that parties subscribing a policy should take care to have inserted in it those representations which they consider the basis of their contract. The neglect to do so leads to much confusion and litigation. In the present case, no complaint has been made against the mode in which the question was presented to the jury, and if they thought that the defendant took the risk, not on the representation that only a small quantity of rock-salt had been, or would be put on board, but on account of the certificate of sea-worthiness that had been left with the brokers, they said rightly that the representation by *Corrie* was not material. I am, therefore, of opinion, that no sufficient ground for disturbing their verdict has been pointed out.

Rule discharged.

Whitman v. Black 13 M. & W. 507.

Saturday,
July 4th.

GLASSPOOLE *against* YOUNG and Others.

Where a sheriff, under a writ of *fi. fa.* against *A.*, seized and sold the furniture in his house, where he lived with a woman to whom he had been married, and to whom the goods belonged before the marriage: Held, that the woman having afterwards discovered that the marriage was void, might maintain trover against the sheriff, and recover the value of the goods, although it exceeded the price for which they were sold.

TROVER against the late sheriff of *Surry* and his bailiffs for certain goods and chattels. Plea, the general issue. At the trial before Lord *Tenterden* C. J., at the sittings after *Trinity* term 1828, it appeared that in 1823 the plaintiff, then a widow, inter-

married

married with one *Mearing*. The goods in question, at the time of the marriage, were her property. In 1824 a judgment on a warrant of attorney was entered up against *Mearing*, and a writ of *fi. fa.* issued, under which the sheriff of *Surry* seized the goods in question, in the house where *Mearing* and the plaintiff lived together as man and wife. A motion to set aside that judgment was made, founded on the joint affidavits of *Mearing* and the plaintiff, in which she described herself as his wife. The matter was referred to the Master, who directed that the judgment should stand, and thereupon the sheriff sold the goods. The plaintiff afterwards discovered, that when she intermarried with *Mearing* he had another wife living, of which she informed the defendants, and demanded her goods, which were not restored. For the defendants it was contended, that the sheriff was justified in seizing the goods as *Mearing's*, inasmuch as the plaintiff represented herself to be his wife. Lord *Tenterden* told the jury, that if the goods were not *Mearing's* but the plaintiff's, she was entitled to recover, unless something had occurred to deprive her of that right. That if she had lived with *Mearing* and passed as his wife, knowing at the time that she was not so, perhaps she might not be allowed now to say she was not his wife. And his Lordship desired them to say, whether at the time of the execution the plaintiff knew that *Mearing* had another wife living, if not, she was entitled to a verdict. The jury found a verdict for the plaintiff for the value of the goods, which considerably exceeded the sum for which they were sold under the execution; and the defendant had leave to move to enter a nonsuit or reduce the damages. In *Michaelmas* term a rule nisi was accordingly obtained, and

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Rule discharged.

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Saturday,
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married

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Gurney and *Comyn* now shewed cause. The jury having negatived fraud, it is clear that the plaintiff is entitled to recover. The sheriff was directed to take the goods of *Mearing*, but instead of so doing, he took those of the plaintiff. At that time she believed herself to be the wife of *Mearing*, and that consequently the goods were his. Under that impression she did not resist the seizure; but that cannot be considered as a consent on her part, for she did not then know that she had a right to resist. *Edwards v. Bridges (a)* is a much stronger case than the present. There the plaintiff cohabited with one *Salmon* and passed as his wife. A writ issued against him, and when the officer went to execute it, she represented herself to be his wife, but before the seizure and sale, claimed the goods, and although the plaintiff had passed as the wife of *Salmon*, knowing herself not to be so, she was held entitled to a verdict upon proving that the goods were hers.

The *Attorney-General* and *Coltman* contra. The case of *Edwards v. Bridges (a)* is distinguishable from the present case. There the sheriff had full notice before the goods were seized or sold, that they were not the property of the party against whom the execution had issued. Acting in defiance of that notice, he took upon himself the risk of making out that the goods belonged to the debtor. But here there was nothing to put the sheriff on his guard. The plaintiff had held herself out as the wife of *Mearing*, and continued to do so for two years after the execution executed. Now where the sheriff is deceived by a false representation of a party respecting the ownership of goods, it is not competent for that

(a) 2 Stark. N. P. C. 396.

party

party to turn round upon him and sue him for an error which he himself has been the cause of. In *Morgans v. Brydges* (a), Lord *Ellenborough* says, "where a party has misrepresented himself, and taken a name which does not belong to him, it is not permitted to him to take advantage of his own wrongful act, so as to enable him to avoid the consequences of it; for a mistake induced by his own affirmation cannot give him a right of action. I remember a case to this effect before Lord *Loughborough*, where a person had obtruded himself instead of another on the sheriff's officers, and after having been arrested, brought an action against them, and Lord *Loughborough* held that it would not lie. I dissented from that decision, but on fuller consideration I have been satisfied that case was rightly determined." *Mace v. Cadell* (b) is to the same effect. It is true that the representation, though false, was not fraudulent. But it makes no difference to the sheriff whether it is fraudulent or not, he is equally deceived in the one case as in the other. Neither ought it to make any difference as to the plaintiff as far as civil rights are concerned, however it may affect her morally speaking; if, indeed, civil actions were to be considered as operating in *posnam*, then it might be reasonable to attach to the fraudulent misrepresentation one consequence, and a different one to an innocent misrepresentation; but as it is a mere question of civil rights, on what sound principle are the consequences to be so different? It is not every intermeddling with the property of another that amounts to a conversion; there must be a wrongful conversion to enable a plaintiff to maintain *trover*.

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 GLASPOOLE
against
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(a) 1 B. & A. 650.

(b) *Comp.* 232.

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against
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It must be admitted, that the case of *Price v. Helyar* (a) is in some degree at variance with this doctrine, but that case was at variance with many other cases of great weight, *Bailey v. Bunning* (b) as explained in *Philips v. Thompson* (c), *Cole v. Davies* (d), *Cooper v. Chitty*, as reported in 1 *Burrow*, 20., *Timbrel v. Mills* (e), *Coppendale v. Bridgen* (g), *Smith v. Mills* (h), *Lee v. Lopes* (i), *Coles v. Wright* (k), *Tope v. Hockin* (l). In the present case, although there was an intermeddling with the property of the plaintiff, the sheriff is in no fault, and it would be extremely hard if he could be made liable in trover, and saddled with payment of the whole value of these goods, which fetched at the sale scarce half the estimated value.

Lord TENTERDEN C. J. I am of opinion that this rule must be discharged. It certainly may be hard on the sheriff, that he should be held liable in such a case as the present, where no misconduct can be imputed to him or his officers; and it may be hard on the plaintiff in the former suit, that he should be called upon to refund the money that he has received as the fruits of his judgment. But, if on account of such hardship we were to make this rule absolute, we should break in upon a well-established rule of law, that if by process the sheriff is desired to seize the goods of A., and he takes those of B., he is liable to be sued in trover for them. But it was said that the plaintiff, having seen the goods re-

(a) 4 *Bingh.* 597.(c) 3 *Lev.* 192.(e) 1 *Bl.* 205.(h) 1 *T. R.* 480.(k) 4 *Taunt.* 198.(b) 1 *Lev.* 173.(d) 1 *Ld. Raym.* 724.(g) 2 *Burr.* 814.(i) 15 *East.* 230.(l) 7 *B. & C.* 101.

moved

moved without expressing any dissent, could not recover, and the case of *Morgans v. Brydges* was cited. But that is very different from the present. An execution is a proceeding in invitum, and the plaintiff acquiesced, because she did not know that she had power to resist, but afterwards discovered her error. The case then is merely this, that the sheriff by mistake took her goods, supposing them to be *Mearing's*. Under such circumstances, it seems to me that she was entitled to recover in this action the value of the goods found by the jury, and not merely the price for which they were sold.

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BAYLEY J. There was no imposition practised by the plaintiff in this case. At the time of the seizure, both she and the sheriff laboured under a mistake. I think, therefore, that she was entitled to recover the value of her goods which were seized and sold without authority.

LITTLÉDALE J. concurred.

PARKE J. The rule of law is undoubted, that the sheriff must at his peril seize the goods of the party against whom the writ issues. There was nothing like leave and licence in this case. A case may, perhaps, exist in which a woman would be estopped if the seizure of her goods was made upon her assertion, that she was the wife of the person against whom the writ issued, but nothing of that kind occurred in the present case.

Rule discharged.

1829.

Saturday,
July 4th.

The KING *against* DAY.

Where a rule is obtained for a quo warranto, upon the ground that a party has vacated a corporate office by having accepted a second incompatible office, the affidavits must shew a valid appointment to the second office, the acceptance of which is made the ground of motion.

QUO warranto calling on the defendant to shew by what title he exercised the office of alderman of *Norwich*, on the ground that he had accepted an incompatible office, viz. that of inspector of corn returns. By the charter, the aldermen were justices of peace within the city. The affidavit in support of the rule stated that the defendant, one of the aldermen of *Norwich* and a justice of peace for the city, was in the month of *April* last appointed inspector of corn returns in and for the said city and county of the city of *Norwich* as deponent believed, he the deponent having seen in the books kept by the clerk of the peace of and for the said city and county, in which are recorded the proceedings of justices of the peace of the said city and county, an entry of the appointment of the defendant at a meeting of the said justices, holden on the 28th of *April*, which deponent believed to be a true entry of the appointment; that the defendant accepted the office, and had ever since acted in and was then acting in and executing the office of inspector of corn returns of and for the said city and county, as deponent was informed and verily believed.

Alderson and *Patteson* now shewed cause. Assuming that the acceptance of the office of inspector of corn returns (which is not a corporate office) will vacate the office of alderman, it ought to be distinctly shewn by the affidavits that the defendant has been legally appointed to the office

office of inspector of corn returns. The affidavit states the belief of the party that the defendant was appointed, because he had seen an entry in a book kept by the clerk of the peace. That is no evidence of an appointment made by the court of quarter sessions. Now the 9 G. 4. c. 60. s. 21. requires that in the case of a city which is a county of itself, the inspector of corn returns shall be appointed by the mayor and justices of peace assembled at the quarter sessions of such city, or some adjournment thereof. It is not sufficient to shew that the defendant exercised the office, the acceptance of which is made the ground of removing him from the corporate office. In *Rex v. Slythe (a)*, the affidavit applied to the office from which it was proposed to remove the party. Here it applies to an office, the acceptance of which is made the ground of removing him from another.

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against
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The *Attorney General* and *Campbell* contra. The affidavit is sufficient. It states the belief of the party that the defendant exercised the office. That is consistent with the practice of the Court in other cases, *Rex v. Slythe*.

Lord TENTERDEN C. J. I think we may discharge this rule without breaking in upon any former practice of the Court. The affidavits state the belief of the party swearing, that the defendant had acted as inspector of corn returns. But the mere acting as inspector of corn returns, unless he had been duly appointed to that office, would not vacate the office of alderman. The affidavit further states the party's belief, that the defendant had

(a) 6 B. & C. 245.

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**The King
against
Day.**

been appointed to the office of inspector, and vouches as a reason for such belief, that he had seen an entry in the books of the clerk of the peace, by which it appeared that the defendant was appointed at a meeting of justices. If the affidavit had stated in the most positive terms that he had been appointed at a meeting of justices, it would not have shewn a good appointment, because such an appointment is required by the act of parliament to be made by the justices *assembled at quarter sessions*. Unless the defendant was appointed by justices assembled at the quarter sessions, he never filled the office of inspector of corn returns, and consequently cannot, by reason of his acceptance of that office, have vacated that of alderman. We think, therefore, that the rule should be discharged, but without costs.

Rule discharged without costs.

*Saturday,
July 4th.*

TOMKINS against SAVORY.

A note sent by a broker to his principal containing an account of a purchase of shares in a joint stock company, and the price paid for the same, does not require a stamp.

ASSUMPSIT for money had and received. Plea, general issue. At the trial before Lord *Tenterden* C. J., at the *London* sittings after *Trinity* term 1828, it appeared that the defendant, a broker, had purchased on account of the plaintiff fifty shares in the Continental Gas Company, and represented to him, that at the time of the purchase 8*l.* per share had been already paid on those shares, when in truth it turned out that 5*l.* only had been paid on each share. The action was brought to recover 3*l.* per share on them. The plaintiff produced in evidence the following unstamped note signed by the defendant: — “Bought for Mr. *Tomkins* fifty Continental



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require a stamp, *Mullett v. Huchison (a)*, *Langden v. Wilson (b)*. In the former case, an acknowledgment by the defendant that he had bills belonging to another was held not to require a stamp.

The *Attorney-General* and *B. V. Richards* contra. The paper in question, purported to be a memorandum of a contract for the purchase of fifty shares in the Continental Gas Company. Per se, therefore, it is evidence of a contract, and required a stamp; and not being admissible in evidence for the purpose of proving the contract, it is not admissible for any other purpose.

LORD TENTERDEN C. J. We think the paper in question did not require to be stamped. It was a note sent by a broker to his principal, containing an account of a purchase he had made of shares. In *Joseph v. Pebrer (c)*, my brother *Littledale* held at nisi prius that such a note did not require a stamp, inasmuch as it was not a memorandum between party and party of any agreement. In truth, these brokers' notes are not contracts, nor evidence of contracts; they may be evidence that the broker has performed such a transaction. We think the rule for entering a nonsuit ought not to be made absolute.

The rule was afterwards made absolute for a new trial, upon the ground that the verdict was against evidence.

(a) 7 B. & C. 639.

(b) *Ibid.* 640.

(c) 1 C. & P. 341.

1829.

STEVENSON *against* ROCHE.Saturday,
July 4th.

A LATITAT having issued on the 20th of *February* against *Horner*, returnable the first return of *Hilary* term, a declaration was delivered on the first day of *Hilary* term, conditionally, until special bail should be put in and perfected. The defendant and *H. Crease* justified as bail on the 3d of *February*. *Horner* pleaded the general issue, upon which issue was joined, and the issue delivered on the 7th of *February*. Notice of trial was given by the plaintiff, for the sittings after *Hilary* term. ' On the 12th of *February*, *Horner* withdrew his plea of the general issue, and gave a cognovit for the payment of the debt and costs in that action, by three instalments; the first on the 26th of *February*, the second on the 16th of *April*, and the last on the 1st of *May*, with a stay of execution until default made. *Horner* made default in the payment of the first instalment due on the 26th of *February*, whereupon the plaintiff signed judgment on the 27th of *February*. On the 27th of *February*, a *fi. fa.* was issued for the whole debt and costs, returnable on *Wednesday* next after fifteen days of *Easter*, indorsed to levy the sum of 37*l.* being the whole debt and costs upon which the sheriff returned that he had levied, 253*l.* 1*s.* 2*d.* part of which, viz. 58*l.* he had paid to the landlord for rent; another part, 7*l.* 10*s.* he had retained for poundage; and the residue, 192*l.* 11*s.* 2*d.* he paid over to the plaintiff. A *ca. sa.* for the residue of the damages due to the plaintiff was issued against *Horner*, to which the sheriff returned non est inventus. On *Thursday* the 16th day of

Bail are not discharged by the plaintiff's taking a cognovit from the principal, unless time be thereby given.

The plaintiff may sue out a *fi. fa.* against the principal, and levy part of the debt, and afterwards sue out a *ca. sa.* as to the residue, and charge the bail.

June,

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STEVENSON
against
ROCHE.

June, the defendant was served with a bill of *Middlesex*, calling upon him to answer the plaintiff in a plea of debt on a recognizance. A rule nisi had been obtained to set aside the proceedings against the bail for irregularity, on the ground that the bail were discharged by the plaintiff's having taken a cognovit; and secondly, because the plaintiff had first levied under a fi. fa. and afterwards sued out a ca. sa.

Talfourd shewed cause. The bail are not discharged by the plaintiff's taking a cognovit from the principal without their consent, when judgment is to be entered up immediately, or the debt is payable by instalments within the time in which the plaintiff would have been entitled to judgment and execution had he gone to trial in the original action. *Tidd's Practice*, 295, 9th edit. Here all the instalments were payable before the plaintiff could have obtained judgment, as the last instalment was payable on the 1st of *May*, and it would have been impossible for the plaintiff to have obtained judgment before the 11th (a). The other point on which the application will be supported; viz. that a fieri facias had been issued, and part of the debt levied before the issuing of the ca. sa., does not appear to have been decided in this Court; but it seems from a passage in *Manning's Exchequer Practice*, p. 472., to have been determined by *Gibbs C. J.* in the Common Pleas, that such a writ and partial levy did not preclude a plaintiff from proceeding against the bail for so much of his debt as the previous execution had failed to realize. It is there laid down thus: "To found proceedings against bail on their recognizance, the plaintiff must shew his

(a) *Easter* term commenced on the 6th of *May*.

election

election to seek his remedy against the person of the defendant by issuing a *capias ad satisfaciendum*, which will be available for this purpose, notwithstanding part of the debt may have been levied under a *fieri facias*, per *Gibbs C. J.* 1816." And in p. 475. of the same work, a case of *Waring v. Jones*, *Easter term* 1807, is cited, where a *ca. sa.* was issued after a *fi. fa.* on which part had been levied; and no objection was raised on this ground. But, supposing there were no authority on the point, it lies on the bail, who contend that they are discharged, to shew some principle on which they ought to be so discharged. There is no such principle. It must be conceded that, independent of the liability of bail, it is perfectly regular for a plaintiff first to sue out a *fieri facias* against the goods of his debtor, and, if that be ineffectual in whole or in part, afterwards to sue out a *capias ad satisfaciendum* for such sum as remains unsatisfied. Against the principal, then, such a proceeding is clearly good; and why not so against the bail? So far from being damnified by the proceeding, they are benefited, as their liability is diminished by the amount of the sum levied under the *fieri facias*; and if the creditor be not at liberty so to proceed, this consequence must follow, — that in no case, where there are sufficient bail, will a *fieri facias* be sued out, unless there be an absolute certainty of levying the whole; so that the doctrine on which the application is founded would be very prejudicial to the interests of bail. It is true, the plaintiff must shew his election to proceed against the person of his debtor; but he may do this at any time when the law allows him so to proceed; and as he may so proceed after a partial levy under a *fieri facias*, it follows that, after such levy, he is in time to make that election, by making which, and the return

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of the writ of ca. sa., the liability of bail to be sued on their recognizance attaches.

Archbold, contrà. The reason why a cognovit by the principal is a discharge of the bail, is, that the bail are thereby placed in a much worse situation than they would otherwise be in; it takes from them all chance of the plaintiff's failing in the action against their principal; all opportunity of watching the proceedings, and seeing that a real debt, to a certain amount, and for the cause stated in the declaration and affidavit to hold to bail is proved to be actually due from the principal to the plaintiff. For this reason, a cognovit by the principal is a discharge of the bail, whether it give a further time for the payment of the debt than the principal would otherwise have or not. If it were otherwise, a plaintiff and defendant might readily collude for the purpose of fixing the bail, where perhaps no debt was due. As to the second point, in *2 Crompton's Practice*, 72. (first edition, 1780,) it is laid down, "If the plaintiff proceeds by *elegit* or *fieri facias*, he aims at a satisfaction by a seizure of the defendant's property, and by taking out either of those writs of execution, he cannot fix the bail; but if he would look to the bail to make him satisfaction, his execution must be by a *capias ad satisfaciendum* against the principal, and that is the only writ which has effect to fix the bail." *2 Sellon's Practice*, 112. is more to the point. There it is said, "If the plaintiff, after he has recovered judgment, does not proceed against the person of the defendant, but, on the contrary, takes out execution against his goods or lands by *fieri facias* or *elegit*, he has made his election, and the bail are discharged." And it is but reasonable that it should be so; for, by suing out a *fieri facias*, the plaintiff gives no intimation to the bail
that

that he intends to proceed against the person of the principal, and the principal may abscond before the fieri facias is executed; whereas, by suing out a ca. sa., he plainly indicates his intention of proceeding against the bail if they do not render their principal within a certain time; for the ca. sa., when sued out for the purpose of fixing bail, is always entered in a particular book in the sheriff's office, to which the bail may at any time resort for information.

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Lord TENTERDEN C. J. We are clearly of opinion upon the first point, that bail are not discharged by the plaintiff's taking a cognovit from their principal without their consent or knowledge, unless, by the terms of the cognovit, he is to have a longer time for the payment of the debt and costs than he would have if the plaintiff had proceeded regularly in the action. As to the other point, we will take time to consider of our judgment.

Cur. adv. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court. It was contended in this case, that the plaintiff, by having levied part of his debt under the fieri facias, had made his election (as against the bail) to have satisfaction by a seizure of the defendant's property, and that he could not afterwards have satisfaction against the person of the defendant so as to charge them. We have considered the point. The bail cannot be prejudiced by such a proceeding. The levying of part of the debt will generally be an advantage to the bail, as they will have the less to pay. We think such a proceeding regular, not only as against the principal, but to charge the bail.

Rule discharged with costs.

1829.

Monday,
July 6th.

HARRATT and Another against Wise.

In an action on a policy on a voyage from *Liverpool* to a blockaded port, it was proved that the vessel sailed from *G.* on the voyage before the blockade was notified in this country, but afterwards put into another port in this kingdom after such notification in the *London Gazette*, and when the blockade might be known there. The jury found that the captain did not know of the blockade: Held, that knowledge by the captain was not to be presumed, on the principle that notice to a state was notice to all the subjects of that state, but that it was a question of fact properly left to the consideration of the jury.

THIS was an action on a policy of insurance on goods by the ship *Ann*, at and from *Liverpool* to *Buenos Ayres*. The loss was alleged to be by capture. At the trial before Lord *Tenterden* C. J. at the *London* sittings after *Trinity* term 1828, it appeared that the vessel sailed from *Liverpool* on the 4th of *February* 1826, and having met with bad weather, and sustained injury, put into *Lochindale*, in one of the western isles of *Scotland*, on the 19th or 20th of *February*, to repair the damage, and sailed thence on the 19th of *March*, arrived off *Monte Video* in *May*, and was there taken by the squadron stationed for the blockade of *Buenos Ayres*, carried into *Monte Video*, and thence sent to *Rio Janeiro*, where the cargo was taken out and put into the government stores. Notice of abandonment was given on the 6th of *May*, and refused. It further appeared, that some of the crew having deserted at *Lochindale*, the master went to *Greenock* to procure some other men, and was absent about five days. These facts were proved by the mate. The master was not examined at the trial. On the part of the defendants, it was proved that the blockade of *Buenos Ayres* was notified in the *London Gazette* on the 18th of *February*, and that the insurance was made on the 22d of that month. The mate denied any knowledge by himself, and as far as he knew by the captain, of the existing blockade, till the ship came up to the blockading squadron by night. The captain, on observing a number of ships together, dropped anchor, and waited till daylight for further information, when his ship was seized. Lord

Tenterden

Tenterden left it to the jury as a question of fact, whether the master was informed of the blockade before he sailed from *Lochindale*. The jury found that he was not, and a verdict passed for the plaintiff. A rule nisi had been obtained for a new trial, on the ground that the voyage, being to a blockaded port, was illegal, and that the notice of the blockade in the *Gazette* was notice to all the king's subjects; and, therefore, that the captain, at the time when he sailed, must be presumed to have had notice; and the cases of the *Neptunus* (a), the *Adelaide* (b), and the *Shepherdess* (c), were cited.

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The *Attorney-General* and *Tomlinson* now shewed cause. The voyage was, in the first instance, innocent, having commenced before notification of the blockade. The insurance was upon an innocent event. The policy being *prima facie* legal, the law will not presume that the captain would act illegally, but will make an implied exception of all illegal intention, as in *Lubbock v. Potts* (d), where a memorandum, extending a policy to all risks whatsoever, *British* capture, seizure, and detention included, was considered to extend only to losses happening by the unlawful capture and detention, without any fault of the assured, and not therefore to vitiate the policy. The case of *Kellner v. Le Menurier* (e), is also an authority for restricting the general terms of a policy to risks legally insurable against. Capture by a blockading squadron, in case the captain persisted in a voyage to a blockaded port after notice of the blockade, would not be one of those risks. The

(a) 2 Rob. Adm. Rep. 110.

(b) 2 Rob. Adm. Rep. 112. n.

(c) 5 Rob. Adm. Rep. 262.

(d) 7 East, 449.

(e) 4 East, 396.

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illegality of the policy must be the consequence of the illegality of the voyage. In the case of deviation, the policy is good till the ship reaches the dividing point, and a loss sustained before reaching it is recoverable, *Hare v. Travis* (a), *Heselton v. Allnutt* (b). The policy may be good for the voyage, so long as it remains legal, that is, until the captain has notice of the blockade, or if the voyage is determined before notice. If the ship should founder at sea in the course of the voyage, before the captain has notice of the blockade, there is no reason why such a risk should not be protected by the policy. Capture by the blockading squadron, without any fault on the part of the captain, is also a risk legally insurable against, and comprehended by the general terms of the policy. The finding of the jury is conclusive as to the fact that the captain had no knowledge of the blockade. The expressions of Sir *W. Scott* in the cases of the *Neptunus* (c) and the *Adelaide* (d), that from the moment a notification is made to a government, it binds the subjects of that state, because it is supposed to circulate through the whole country, must be taken with reference to the facts of those cases, and the parties between whom they were decided. The decisions were upon the right of capture between the subjects of different states. As between nation and nation, it may be admitted that notice to a government is notice to its subjects, at least after the lapse of a reasonable time for the government to communicate that notice. In a municipal court between the subjects of the same state assured and underwriters, the fact of notice and ille-

(a) 7 B. & C. 14.

(b) 1 M. & S. 46.

(c) 2 Rob. Adm. Rep. 110.

(d) 2 Rob. Adm. Rep. 112. n.

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must be taken to have known of the blockade before he left *Greenock*. In the case of the *Shepherdess* (a), the same learned Judge lays it down, that in case of a blockade by notification, the act of sailing constitutes the offence. In this case the captain must be considered as having sailed from this country with knowledge of the blockade. He thereby incurred the guilt of an offence against the law of nations. The vessel was lost in consequence of attempting to break the blockade. That is a risk for which the underwriters were not liable.

Cur. adv. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court, and after stating the facts of the case, proceeded as follows :

At the trial it was contended on the behalf of the defendant, and, again, on moving for a new trial, that the voyage, being to a blockaded port, was an illegal voyage, and the policy void. A rule to shew cause being granted, this objection was again urged; and it was further contended, that as the master was at *Lochindale* and at *Greenock* after the time when intelligence of the notification of the blockade might have arrived, and must be supposed to have arrived at those places, the policy was avoided by the attempt to break the blockade; and the cases of the *Neptunus*, the *Adelaide*, and the *Shepherdess*, were cited for the defendant. We think it cannot be said that this voyage was illegal in its commencement, because the voyage began by the ship's departure from *Liverpool*, which was before the publication of the *Gazette*. And although the blockading nation may, by the law of nations, be allowed to consider its

(a) 5 Rob. Adm. Rep. 263.

noti-

notification of a blockade, as notice thereof to all the subjects of the nation to which the notification has been made, for it cannot be expected that the blockading nation should be able or required to prove actual knowledge in the master of every vessel of the other country, yet such a rule, allowing it to prevail to the supposed extent, (though it appears probably to be open to some qualification and relaxation for the furtherance of justice and the benefit of commerce,) cannot, in our opinion, be applied to the case of insurance. And if the possibility, or even probability, of actual knowledge should be considered as legal proof of the fact of actual knowledge, as a *presumptio juris et de jure*, the presumption might, in some cases, be contrary to the fact, and such a rule might work injustice. We therefore think that such a rule cannot be established as a rule of insurance law; but that knowledge, like other matters, must become a question of fact for the decision and judgment of a jury. The probability of actual knowledge, upon consideration of time, place, the opportunities of testimony, and other circumstances, may in some instances be so strong and cogent, as to cast the proof of ignorance on the other side in the opinion of a jury, and in the absence of such proof of ignorance to lead them to infer knowledge; but still we think the inference properly belongs to them. In the case now before the Court, if the jury had drawn the inference, we are not prepared to say they would have done wrong, neither can we say that they did wrong in declining to draw that inference; and, therefore, we cannot set aside their verdict, and the rule for a new trial must be discharged.

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Rule discharged.

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Monday,
July 6th.

NAYLOR and Others *against* TAYLOR.

A policy on goods at and from *Liverpool* to any port in the river *Plate* was effected, after notification in the *London Gazette* that such ports were blockaded. The ship after such notification sailed from *Liverpool*, and was taken by a *Brazilian* frigate in the river *Plate*, and sent to *Rio Janeiro* for adjudication, but was rescued by the master and crew, who brought the ship and cargo back to *Liverpool*, where the master landed and warehoused the goods. The assured, after they had heard of the capture, and after the rescue, but before they heard of it, gave notice of abandonment to the underwriters. The jury found, that the master

did not intend to break the blockade: Held, first, that the voyage insured was not illegal, as the vessel might sail for *Buenos Ayres* without contravening the law of nations, for the purpose of inquiring whether the blockade continued.

Secondly, that the assured had no right to recover for a total loss by reason of their having offered to abandon, because the abandonment must be viewed with regard to the ultimate state of facts at the time when the offer to abandon was made.

THIS was an action on a policy of insurance, dated the 6th of *March* 1826, on goods by the ship *Monarch*, at and from *Liverpool* to any port or place in the river *Plate*, with liberty, in the event of a blockade, or being ordered off the river *Plate*, to proceed to any other port, and there wait or discharge. The loss was averred to have been by capture. Plea, general issue. At the trial before Lord *Tenterden* C. J., at the *London* sittings after *Trinity* term 1828, it appeared that the ship sailed on the voyage insured from *Liverpool*, on the 11th of *March* 1826; that she arrived in the river *Plate* on the 22d of *May*, and was captured by a *Brazilian* frigate on the 23d of *May*. She was afterwards rescued on the 21st of *July*, (as more particularly stated in the judgment delivered by the Court,) and on the 20th of *September* 1826 arrived at *Liverpool*, where the master landed and warehoused the goods. The plaintiffs had not possession of them. The notification of the blockade of the ports in the river *Plate* belonging to the government of *Buenos Ayres*, by the Emperor of *Brazil*, was published in the *London Gazette* on the 18th of *February* 1826. On the 28th of *August* 1826, verbal notice of abandonment was given to the defendant, which he refused to accept. This action was commenced in *Hilary*

term

term 1827. It was contended, on behalf of the defendant, that the voyage being to a blockaded port after notification of the blockade was illegal; and, secondly, that there was not a total loss of the goods, they never having been taken from the ship, but brought back in her to *Liverpool*. Lord *Tenterden* left it to the jury to say, whether the master intended to violate the blockade. The jury said they were not satisfied that he did intend to violate the blockade, and a verdict was found for the plaintiff, but liberty was reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion there was not a total loss. A rule nisi had been obtained for entering a nonsuit, upon the ground, that there was not a total loss; or for a new trial, on the ground that the voyage was illegal: and the cases of the *Neptunus* (a), the *Adelaide* (b), and the *Shepherdess* (c), were cited.

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Campbell and *R. Scarlett* on a former day in this term shewed cause. The jury have found that there was no intention on the part of the master to break the blockade. He was justified in going to the river *Plate* to enquire whether the ports were blockaded. There was no ground for saying that the policy was void ab initio. There was nothing illegal in the adventure. The blockaded ports were at the other extremity of the globe. The blockade might be suspended or determined long before the arrival of the vessel. Then, supposing the policy to be valid, the assured, under the circumstances of this case, had a right to abandon to the underwriters, and to claim from them a total loss. The vessel was taken possession of by a superior force,

(a) 2 *Rob. Adm. Rep.* 110.(b) 2 *Rob. Adm. Rep.* 112. n.(c) 5 *Rob. Adm. Rep.* 262.

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and the goods have never been restored to the plaintiffs. As to them a total loss accrued at the time of the capture, and has continued to the present time, *Holdsworth v. Wise (a)*, *Parry v. Aberdeen (b)*. In the first-mentioned case it was held, that there was a total loss on the abandonment of the crew, and that it was not turned into a partial loss by the subsequent events.

The *Attorney General* and *Alderson* contra. The policy was void, for it was effected on a voyage to a blockaded port after public notification of the blockade in the *Gazette*, and the vessel sailed on that voyage. Assuming that there was no intention to violate the blockade, it was the duty of the master to have waited for adjudication: his rescue of the ship was an act done in breach of the law of nations. At all events, he ought to have gone to some other port to wait or discharge, according to the liberty reserved in the policy. Secondly, the assured had no right to claim for a total loss, because they abandoned when they had heard of the capture, and before they heard of the rescue. In *Hamilton v. Mendes (c)* Lord *Mansfield* says, that in case of the ship being taken, the insured may demand as for a total loss and abandon, provided the capture or the total loss occasioned thereby continue to the time of abandoning and bringing the action. *Bainbridge v. Neilson (d)* is to the same effect. Lord *Ellenborough* there said, the effect of an offer to abandon was this: if it be made on supposed facts which turn out to be true, the assured had put himself in a condition to insist upon the abandonment; but it is not enough that it is properly made on facts which are

(a) 7 B. & C. 794.

(b) 9 B. & C. 411.

(c) 2 Burr. 1198.

(d) 10 East, 529.

supposed

supposed to exist at the time, if it turn out that no such facts existed. Here, at the time when the offer to abandon was made, the supposition was that the vessel at that time remained in the hands of the captors, which turned out not to be the fact. The ship and cargo had been rescued, and were on their way to *Liverpool*, where they afterwards arrived, and remained at the time when the action was brought.

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Cur. adv. vult.

LORD TENTERDEN C. J. now delivered the judgment of the Court. This was an action on a policy of insurance dated the 6th of *March* 1826, on goods by the ship *Monarch* at and from *Liverpool* to any port or place in the river *Plate*, with liberty, in the event of a blockade, or being ordered off the river *Plate*, to proceed to any other port, and there wait or discharge. The loss was averred to have been by capture. The cause was tried before me, and a verdict was found for the plaintiff, with liberty to move to enter a nonsuit if the Court should be of opinion that there was not a total loss.

At the trial, it appeared that the ship sailed from *Liverpool* on the 11th of *March* 1826, and was proceeding up the river *Plate* for *Buenos Ayres*, when she met with a *Brazilian* frigate below *Monte Video*, on the other side of the river, was detained and sent into *Monte Video*, and, after remaining there for some time, was sent from thence for *Rio Janeiro* for adjudication, with the original master and first and second mates, the steward, a *Lascar*, another of her crew (who was the witness examined at the trial), a prize-master, and several black and white soldiers and sailors. She sailed

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in company with several other ships, but was separated from the convoy. Her own master and crew rose upon and overpowered the others, and bound and sent them all away, except two, in the long boat, and brought the ship and cargo back to *Liverpool* in *September*, where the master landed and warehoused the goods, and the plaintiffs had not had the possession of them. In the interval between intelligence of the capture and of the rescue, notice of abandonment was given but not accepted. The rescue had in fact taken place before the notice of abandonment. The notification of the blockade of the ports in the river *Plate*, belonging to the government of *Buenos Ayres*, by the Emperor of *Brazil*, was published in the *London Gazette* on the 18th of *February* 1826. The jury said they were not satisfied that the master intended to violate the blockade. On the motion for a nonsuit, the cases of the *Neptunus* (a) and of the *Adelaide* (b), and of the *Shepherdess* (c), were cited for the defendants, and it was contended that this was an illegal voyage, being to a blockaded port after notification of the blockade; and further, that there was not a total loss of the goods, (they were said to be bale goods,) they having never been taken from the ship, but brought back in her to *Liverpool*.

On shewing cause, it was further contended on behalf of the defendant, that admitting there was no intention to violate the blockade as found by the jury, the master should have waited for adjudication; that his rescue of the ship was an act contrary to the law of nations, and discharged the policy; or if not, that the return to *Liverpool*, instead of going to some other port

(a) 2 Rob. Adm. Rep. 110.

(b) 2 Rob. Adm. Rep. 111. n.

(c) 5 Rob. Adm. Rep. 262.

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tained them: if it be on the ground of a claim of the nature of salvage, the plaintiffs may have them on satisfying that claim. There is no proof that the goods are deteriorated. The particular adventure on which they were sent has indeed been defeated, but this fact will not in itself make the underwriters liable for a total loss. It therefore becomes necessary for the plaintiffs to shew that the abandonment has the effect of enabling them to recover as for a total loss. If the abandonment is to be viewed with regard to the ultimate state of facts, as appearing before the action brought, according to the opinion of the Court in *Bainbridge v. Neilson*, there has not, for the reasons already given, been a total loss.

Doubts were expressed as to the propriety of the decision in *Bainbridge v. Neilson*, by a very high authority, in the case of *Smith and Others v. Robertson* (a). But notwithstanding those doubts, the rule as laid down in *Bainbridge v. Neilson* was adopted and acted upon by the Court in the two subsequent cases of *Patterson v. Ritchie* (b), and *Brotherston and Another v. Barber* (c). We consider the point to have been well settled, and the rule established by these authorities; and the rule to enter a nonsuit must be made absolute. (d)

Rule absolute for entering a nonsuit.

(a) 2 Dow. 474.

(b) 4 M. & S. 393.

(c) 5 M. & S. 418.

(d) See also *Cologan v. The London Assurance*, 5 M. & S. 447.

In Reg. H. v. Manning 3 B. 1. 871. 1829.
Held . . . Nelson 1 B. 1. 18. 463

PEYTON and Others *against* The Mayor and Tuesday,
July 7th.
 Commonalty, of LONDON, as Governors of
 ST. THOMAS'S Hospital.

CASE. The declaration stated, that a certain messuage or dwelling-house was in the possession of one *F. D.* as tenant to the plaintiffs, which dwelling-house was in part adjoining to a house of the defendants, yet the defendants contriving, &c. to aggrieve the plaintiffs in their reversionary estate and interest in the first-mentioned house, whilst the same was in the possession of *F. D.* as tenant thereof to the plaintiffs, to wit, on, &c. negligently, unskilfully, wrongfully, and improperly, by certain servants of the said defendants in that behalf, altered, pulled down, and removed the said messuage of the defendants, so in part adjoining to the said house in which the plaintiffs were so interested as aforesaid, without shoring up, propping up, or duly securing the said adjoining house in which the plaintiffs were so interested, in order to prevent the same from being damaged by the said altering, pulling down, and removal of the said messuage of the defendants, so that for want of such shoring up, propping up, or duly securing thereof, the said house, in which the plaintiffs were so interested, became and was by and through the altering, pulling down, and removal of the messuage of the defendants, greatly weakened, damaged, and injured, and in part fell down. The second count alleged, that a certain dwelling-house was in the possession and occupation of one *F. D.* as tenant to the plaintiffs, in

Case by a reversioner of a house in *Cheapside* against the owner of the adjoining house, for pulling it down without shoring up the plaintiff's house, in consequence whereof it was impaired, and in part fell down: Held, first, that upon this declaration the plaintiff could not recover on the ground of the defendant's not having given notice that he was about to pull down his house, that not being alleged as a cause of the injury; secondly, that as the plaintiff had not alleged or proved any right to have his house supported by the defendant's; he was bound to protect himself by shoring, and could not complain that the defendant had neglected to do it.

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part

see Brown v. Hindle 1. Co. 1. 20

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part adjoining to a certain other messuage of the defendants, and connected therewith by a certain party-wall, yet defendants contriving, &c. so negligently, unskilfully, wrongfully, and improperly conducted themselves by certain servants employed by them in that behalf in and about the altering, taking away, pulling down, and removing the said messuage of the defendants, that the house in which the plaintiffs were so interested as last aforesaid then and there by such negligent, unskilful, and improper conduct, became and was greatly weakened and damaged, &c. There were other counts imputing improper conduct in the pulling down of the party-wall between the two houses. Plea, not guilty. At the trial before Lord Tenterden C. J., at the *London* sittings after *Trinity* term 1828, it appeared in evidence that the plaintiffs were the owners of a house in *Cheapside*, in the occupation of *F. D.* as their tenant, and that the defendants were owners of the house adjoining to the westward, which was at the corner of *Honey Lane*. This house had been for several years in bad repair, and supported by struts or shores placed against the house at the opposite side of the lane. At length it became necessary to take down the defendants' house and rebuild it, and they entered into an agreement with one *Lees* to demise the premises to him on a building lease. *Lees* sold the materials of the old house by auction, and the purchasers pulled it down, and in so doing, removed the struts by which it had been supported, and did not substitute for them any other struts or shores to support the plaintiffs' house, which, in consequence of the removal of the defendants' house, separated from the house next adjoining to the eastward, and was much injured. The defendants did not shore up the plaintiffs'

tiffs' house either externally or internally: the plaintiffs themselves had put up some internal supports; appeared, that if it had been properly shored in injury would not have happened. Upon this evidence Lord *Tenterden* was of opinion, that the injury had arisen from any misconduct on the part of the defendants, but from the neglect of the plaintiffs to prop up their own house, which they and not the defendants were bound to do, and he directed a nonsuit *Michaelmas* term a rule nisi for setting aside the rule was granted on two grounds, first, that the defendants were answerable for the injury arising from the removal of their house, or if not, still that the defendants ought to have given notice to the plaintiffs to prop up their house.

The *Attorney-General*, *Campbell*, and *Cresswell*, appeared on the former day in this term shewed cause. The question whether notice does not arise on this record. There is no count in the declaration which states the injury to have arisen in consequence of the defendants having pulled down their house without giving notice of their intention to do so; and, therefore, unless the removal of that house was in itself wrongful, the plaintiffs cannot recover. There was no evidence of any carelessness or want of skill in the act of pulling down the house to satisfy the second count: the only ground of complaint proved was that which is alleged in the first count, viz. that the defendants did not shore up the house of the plaintiffs. The question therefore is, whether they were bound to do so before they pulled down their house. It was sufficient for the plaintiffs to prove that their house was injured by the removal of the defendants', they were

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bound to prove also that the removal was wrongful. In *Com. Dig., Action upon the Case* (A), it is said, "An action upon the case is an action founded upon a *wrong*, and concludes contra pacem." And again, "In all cases where a man has a temporal loss or damage by the *wrong* of another, he may have an action upon the case to be repaired in damages." And in *Com. Dig. Action upon the Case* (B 3.), it is said, "It does not lie for an act not prohibited by law, though it be to the damage of the party." And this agrees with the judgment in *Rex v. The Commissioners of Sewers for Pagham* (a), *Boulston v. Hardy* (b); and with the principles of the civil law, *Vattel, Droit des Gens*, b. ii. c. 1., *Domat*. 62. tit. 8. s. 3. art. 9. "Damages occasioned by faults." It does not lie where the damage happens by the negligence or default of the plaintiff himself, *Com. Dig., Action upon the Case* (B 4.), *Virtue v. Birde* (c). The case of *Jones v. Bird* (d) will probably be cited as an authority for the plaintiffs. That was an action against certain commissioners of sewers for removing the arch of a sewer upon which a stack of chimneys rested, in consequence of which the adjoining house and *Jones's* also, which was next to that, fell down, and the defendants were held liable. Three reasons appear to have been given for the judgment: that the commissioners had been guilty of negligence; that they ought to have given notice to the owner of the adjoining house of the manner in which his chimneys were supported; and that they ought to have shored up the house when they removed the arch. That case is perfectly distinguish-

(a) 8 B. & C. 355.

(c) 2 Lev. 196.

(b) *Moore*, 453.

(d) 5 B. & A. 837.

able

able from the present. There the commissioners, acting for the district, were acting for the plaintiff as well as others, not in the exercise of a common law right, but under a special commission: the jury found that they were guilty of negligence; they had power to enter any premises and shore them up; and they had power to raise money to pay the expense of so doing. The owner of the chimneys had built on his own land, where he had a right to build; and the commissioners had no right to remove the support from under them without providing another. Their act was therefore wrongful; and the plaintiffs, having been injured by their wrongful act, had a good right of action. Here the defendants pulled down their house in the exercise of the dominion which the common law gave them over their own property, and the plaintiffs had no right to have their house supported by it. No such right was either alleged or proved. It would, indeed, be a new sort of easement now heard of for the first time. In other instances the uninterrupted enjoyment of an easement over the property of another for a certain length of time, with the knowledge of that other, is held sufficient to give a legal right to the easement; but that is on the ground that such uninterrupted enjoyment raises the presumption of a grant. In such cases as the present no such presumption can arise. It could not be shewn how long the plaintiff's house had been supported by that of the defendants, or, if the fact were so, that they knew it; and it would be very mischievous if every proprietor of a house, on discovering that of his neighbour to be out of the perpendicular, were bound to bring an action against him to rebut the presumption of a grant of an easement. If, however, any grant to

the plaintiffs could be presumed, it could only be of the privilege of having their house supported by that of the defendants so long as it lasted; it could not be of a grant (or rather covenant) that the defendants would support the house for ever. The owner of land over which another has a private right of way is not bound to repair it, *Taylor v. Whitehead* (a), *Bullard v. Harrison* (b). So if there be a demise of land with the use of a pump, the lessor is not bound to repair the pump, *Pomfret v. Ricroft* (c). The defendants, then, if the supposed easement did exist, would not have been liable to an action if their house had fallen by natural decay, and the house of the plaintiffs had followed it. If that be so, neither were they liable in consequence of an injury arising from taking down their house for the purpose of rebuilding it, when it was in so bad a state of repair as to be in danger of falling, for then they were by law bound to pull it down; a house in such a state being deemed a nuisance for which the owner is indictable, *Regina v. Watts* (d).

Brodrick and Dodd contra. There are two grounds on which the plaintiffs are entitled to have the nonsuit set aside: first, that a person taking down his own house is bound to use all reasonable means for preventing injury to his neighbour; and, secondly, if the plaintiffs were bound to shore up their house, they should have had a specific notice from the defendants to do so. There is a great difference between mere nonfeasance and misfeasance. Here the latter is imputed to the defend-

(a) 2 Doug. 745.

(b) 4 M. & S. 387.

(c) 1 Saund. 321.

(d) 1 Salk. 357.

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that "if a man dig a pit in his land, so near that my land falls into the pit, an action on the case lies." So, in *Vin. Abr. tit. Actions (Case)*, n. c., *A.* was seised of a house newly built, and *B.* was seised of a house next adjoining, and *B.* dug a cellar so near the house of *A.* that he undermined it, by reason whereof part of *A.*'s house fell into the hole so dug; action on the case lies for *A.*, *Slingsby v. Barnard (a)*. And so also is *Roberts v. Read (b)*, where surveyors of highways were held liable to an action for digging, in improving a street, so near to plaintiff's wall that they weakened it and it fell. These cases are in favour of the plaintiff, and it matters not whether the damage to the neighbour arise from excavating the adjoining soil or from pulling down an adjoining house. Nor could it have been contended in those cases, that the defendant could exonerate himself of responsibility for the damage arising from his acts, by giving a notice beforehand to his neighbour of what he was about to do. There is no question that an action lies against a neighbour for using on his own premises steam-engines, or furnaces, or noisome trades, noxious or injurious to his neighbour, though these acts are lawful and innocent in themselves; and yet, why might not a party so using his premises protect himself from liability, by giving a notice to his neighbour, if a party is at liberty, on giving such a notice, to pull down his house without regard to the safety of his neighbour's house adjoining? The principle of these cases is also that of the civil law (*c*), which is more full on the sub-

(a) 1 *Roll. R.* 430. pl. 24. *Vin. Abr. tit. Actions (Case)*, n. c.

(b) 16 *East*, 215.

(c) *Dig. lib. 8. tit. 2. De Serv. Præd. Urb.* *Dig. lib. 10. tit. 1. L. 15.*
Dig. lib. 39. tit. 2. L. 24. s. 12.

ject

ject of servitudes and easements, and the rights and obligations of adjacent proprietors than our own; and of the *French* law, derived from the civil law, as laid down by *Pardessus* (a), a writer of authority. The case of *Rex v. Commissioners of Sewers for Pagham* was entirely *sui generis*, and has no application to the facts of this case. That case decided merely this; — that the proprietor of land on the sea coast, exposed to the ravages of the sea, might protect his land by groins or other erections, without regarding whether such erections turned the force of the waves with greater violence against his neighbour's land; it being the neighbour's business to guard himself by similar means against this "common enemy." Here there was no "common enemy" calling for extraordinary safeguards, either on the part of the plaintiffs or defendants; and suppose that the defendants, acting on the principle of the *Pagham* case, had erected any shores or buildings against their house, to protect it from wind or rain or other danger, and that such erections had been injurious to the plaintiffs' house, it is clear that an action would have lain against them by the plaintiffs for the damage sustained, which shews that the principle of that case is incapable of being applied to the facts of the present. Then as to the second point. Supposing that the defendants' duty was simply to give notice of their intention to pull down, no such notice was given, and the second count of the declaration is sufficient to entitle the plaintiffs to recover on this ground. The second count charges the defendants with negligent conduct in and about pulling down the house; and the omission to give a sufficient

(a) *Traité des Servitudes*, p. 248. 260.

notice,

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notice, if such was their legal duty, may fairly be considered negligence within the meaning of the count. If the defendants were entitled to protect themselves by a notice, such notice ought surely to be definite as to the time of pulling down, so as to enable the plaintiffs to consult surveyors, and have the necessary shoring done.

Cur. adv. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court.

This was a special action upon the case brought by the plaintiffs, as the reversioners of a house in *Cheapside* in the occupation of their tenant under a lease, against the defendants as owners of the adjoining house, for injury sustained in consequence of pulling down the defendants' house. The first count of the declaration, after alleging the plaintiffs' interest in a house, which in part adjoined a house of the defendants, charged that the defendants unskillfully, wrongfully, and improperly altered, pulled down, and removed their house adjoining to the plaintiffs' house, without shoring up, propping, or duly securing the plaintiffs' house, in order to prevent the same from being injured by the altering, pulling down, and removing of the defendants' house; so that in want of such shoring up, propping, or otherwise duly securing the plaintiffs' house, that house was greatly injured, weakened, and in part fell down. The second count, alleging that the houses adjoined and were connected by a party-wall, charged that the defendants so negligently, unskillfully, wrongfully, and improperly conducted themselves in and about the altering, taking away, pulling down, and removing the defendants' house,

that

that the plaintiffs' house was, by such negligent, unskilful, and improper conduct, greatly weakened, ruined, and dilapidated, and in part fell down.

The declaration in this case does not allege, as a fact, that the plaintiffs were entitled to have their house supported by the defendants' house, nor does it in our opinion contain any allegation from which a title to such support can be inferred as a matter of law. The complaint also in both counts relates to the fact of taking down the defendants' house, and the manner in which that was done. The first count is evidently framed upon a supposition that it was the duty of the defendants to use the necessary means to sustain the plaintiffs' house when they took down their own; the second count is more general, but it does not charge the want of notice of taking down the defendants' house, in order that the plaintiffs might themselves use the necessary means to sustain their own property, as the injury complained of: and, therefore, in our opinion, the action cannot be maintained upon the want of such notice, supposing that, as a matter of law, the defendants were bound to give notice beforehand; upon which point of law we are not, in this case, called upon to give any opinion.

I have been thus particular in noticing the declaration, because it furnishes an answer to much of the learned arguments that were advanced on the behalf of the plaintiffs in support of the rule for a new trial.

At the trial of the cause before me at *Guildhall*, it appeared upon the plaintiffs' evidence, that the two houses were very old and decayed, the party-wall between them weak and defective; that for some time pieces of timber called struts had been carried across *Honey Lane*, on the east side whereof the defendants' house was situate,

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situate, to the opposite house on the west side of that lane; that the plaintiffs' house adjoined the defendants' eastward; that these struts, by preventing the defendants' house from falling westward, had the effect also of preventing the plaintiffs' house from falling that way; that when the defendants' house was taken down, these struts were necessarily removed, and no other and longer struts substituted extending from the plaintiffs' house to the house on the opposite side of *Honey Lane*, nor any upright shores placed within the plaintiffs' house to sustain the floors and roof without the aid of the party-wall; that if either of these measures had been adopted, the plaintiffs' house might have stood; but that neither of them being adopted, it soon became separated from the house adjoining to it on the east, and either partly fell or was necessarily taken down, and rebuilt, being injured, dangerous, and uninhabitable. It did not appear whether the two houses had been erected at the same time, or at different times; from their construction, it seems likely that they were built at or about the same time. The freehold was then in different hands; and as the governors of the hospital are not likely to have bought or sold in modern times, it is probable that the freehold was also in different hands when the houses were built. These, however, are but conjectures; if the proof of the facts either way would have aided the plaintiffs' case, it was their duty to give the proof.

It did not appear that the defendants gave any previous notice of the intention of pulling down their house, or of the time of doing so, but the defective state of both houses was known to the parties. There had been previous discussion between them, especially with regard

regard to the party-wall, and a notice of rebuilding the party-wall under the act of parliament had been given, but the defendants' house was pulled down before the expiration of the time mentioned in that notice. The operation of taking down the defendants' house was carried on by day, and the operation must have been seen and known by the tenant and occupier of the plaintiffs' house.

Upon these facts appearing at the trial, I was of opinion, at the close of the plaintiffs' evidence, that it was their duty to support their own house by shores within; and upon that ground I directed a nonsuit.

A rule to shew cause for setting aside the nonsuit was granted in the ensuing term; cause was shewn, and the matter very well argued on both sides during the present term. We have considered of it; and adverting to the facts proved, and to the want of evidence from which a grant to the plaintiffs of a right to the support of the adjoining house might be inferred, and to the form of the declaration, we think the nonsuit was right, and the rule therefore must be discharged.

Rule discharged.

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*Tuesday,
July 7th.*

B. BUCHANAN, JACKSON, and HARRIS, Assignees of the Estate and Effects of WILLIAM DUFF and THOMAS BROWN, Bankrupts, against ROBERT FINDLAY, JOHN BANNATYNE and ROBERT BUCHANAN.

A. and Co., merchants at Liverpool, remitted a bill to B. and Co. in London, with directions to get it discounted, and apply the proceeds in a particular way. B. and Co. did not get the bill discounted, but received the money when it became due. Before that time A. and Co. had stopped payment, and desired to have the bill returned to them. A commission of bankrupt having been issued against them before the money was received on the bill by B. and Co.: Held, that the latter were liable to be sued for the amount by the assignees of A. and Co., as money received to their use; and that B. and Co. could not set off a debt due to them from A. and Co.

THIS was an action of assumpsit for money had and received by the defendants, to the use of the bankrupts before their bankruptcy, and of the assignees after it. The defendants pleaded the general issue. At the trial before Lord Tenterden C. J., at the last sitting in *Easter* term 1827, a verdict was found for the plaintiffs, subject to the opinion of the Court on the following case: —

The bankrupts carried on business in *Liverpool*, in partnership, under the firm of *Duff* and *Brown*, until their bankruptcy. A commission of bankrupt was issued against them on the 1st of *February* 1826, under which they were declared bankrupts, and the plaintiffs duly appointed assignees of their estate, and the usual assignment executed to them. The defendants carried on business as merchants in *London*, under the firm of *Findlay, Bannatyne, and Co.*, for several years prior and up to the 23d of *January* 1826, on which day they suspended their payments. The two bankrupts *Duff* and *Brown*, and the defendant *Findlay*, with several other persons, carried on business in partnership in

Liverpool

Liverpool for many years up to the 31st December 1821, under the firm of *Duff, Findlay, and Co.*, which firm was dissolved on that day. At that period the said *Duff* and *Brown* began to conduct business under the firm of *Duff and Brown*. At the time of the dissolution of the firm of *Duff, Findlay, and Co.*, the defendants were under acceptances for the firm of *Duff, Findlay, and Co.*, and for their accommodation, to the amount of 50,000*l.* and upwards. On the dissolution of the firm of *Duff, Findlay, and Co.*, it was agreed among the partners in that firm and the defendants, that the firm of *Duff* and *Brown* should continue to draw bills on the defendants until the assets of the dissolved firm could be collected and realized, to retire such acceptances and discharge the debts of that firm. The said *Duff* and *Brown* did accordingly continue to draw bills on the defendants, which they accepted; and on the 23d day of *January* 1826 the defendants were under acceptances to the firm of *Duff* and *Brown*, but drawn for account of the dissolved firm of *Duff, Findlay, and Co.*, to the amount of 50,000*l.* and upwards. On the same 23d day of *January*, the defendant *John Bannatyne*, at *London*, wrote a letter to the bankrupt *William Duff*, in *Liverpool*, of which the following is a copy:—

“ I have no letters from you this morning, nor the promised remittances. We have been so completely drained between the two accounts, that we have found it totally impossible to get on, and have been driven to the necessity of stopping payment this morning.”

On the same 23d of *January* 1826, the bankrupts at *Liverpool* wrote a letter to the defendants in *London*, of which the following is an extract:—

“ Inclosed please to receive two bills, value 1740*l.*, which place to our credit; and we have to request that
you

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you will pay in cash and in course 900*l.* on our account to Messrs. *Ransom* and Co., bankers, and that you will place the balance, when discounted, to the credit of *Duff*, *Findlay*, and Co. with you."

On the 25th of *January* 1826, the defendant *John Bannatyne*, in *London*, wrote a letter to Mr. *Duff*, one of the bankrupts, at *Liverpool*, of which the following is an extract:—

"I have received your letter of the 23d. It is a thousand pities that the application you now think of making for a loan had not been made two months ago, when we might have been saved. In our present situation we can do nothing with the bills you have sent us till maturity, and of course can pay nothing to *Ransoms*."

On the 30th of *January* 1826, the bankrupts in *Liverpool* wrote a letter to the defendants in *London*, of which the following is a copy:—

"The notice of the suspension of your payments produced a paralyzation of our efforts, and has driven us to the painful necessity of a stoppage. You will please to return to us the specialties we sent you, and received by you since the 23d instant."

On the 1st of *February* 1826, the bankrupts at *Liverpool* wrote another letter to the defendants in *London*, of which the following is an extract:—

"We are surprised that we have not yet received the bills and orders sent to you on our account on the 23d ultimo. It was surely your duty to have appropriated them, barring your suspension, or to have returned them to us."

On the 2d of *February* 1826, the bankrupts at *Liverpool* wrote another letter to the defendants in *London*, of which the following is an extract:—

"We

“ We have your favour of the 1st, and are any thing but satisfied with your reply. We remitted you two bills for a specific purpose, which you received after you had given us notice of a suspension of your payments; and yet to this hour we have neither any acknowledgment of their receipt, nor have they been returned as requested, and as they ought. The same has taken place with the post-office order; neither of which you have attended to in your reply, which we again repeat is any thing but satisfactory.”

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On the 4th of *February* 1826, the bankrupts at *Liverpool* wrote another letter to the defendants in *London*, of which the following is an extract:—

“ We are at a loss to conceive why you should continue to give us no satisfactory reply to our several queries regarding two bills sent you for a specific purpose, and which, as you have not, nor could have in your circumstances, applied them, you ought to have returned, as well as the post-office order we sent.”

On the 6th of *February* 1826, the defendants in *London* wrote a letter to the bankrupts in *Liverpool*, of which the following is an extract:—

“ With respect to the post-office order, we have mislaid it somewhere or other, unless we may have given it to Mr. *Tate* to return to you; because, from the moment we received it, we never had the slightest intention of using it. The bills remitted stand differently: if you have them back you cannot use them, and they are just as safe with us until the question of right is ascertained; we neither desire, nor will we do, any thing respecting them that is not proper.”

The bills of exchange mentioned to be enclosed in the letter of the 23d of *January* 1826, were enclosed therein, and came to the hands of the defendants on

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the 25th of *January* 1826. The bills were: one for 240*l.*, due 7th of *March* 1826; and one for 1500*l.*, due 9th of *March* 1826.

The bankrupts, at the time the letter of the 23d of *January* was written, were indebted to the defendants in the sum of 2000*l.* and upwards, of which 817*l.* 2*s.* 6*d.* have been since received; and the bankrupts ever since have been, and still are, indebted to the defendants in the sum of 1200*l.*, without taking into account the monies which are the subject of the present action. The firm of *Duff, Findlay, and Co.* was on the 29d of *February* 1826, and ever since has been, and still is, indebted to the defendants in a cash balance to an amount greatly exceeding the said sum of 1740*l.* besides the acceptances before mentioned.

The defendants, on the 25th of *January* 1826, the day on which the remittance for 1740*l.* reached their hands, made entries in their bill book and their account current book in the respective accounts of *Duff and Brown*, and *Duff, Findlay, and Co.*, of which the following are copies:—

In the account current of Messrs. *Duff and Brown*.

Dr.	Messrs. <i>Duff and Brown</i> .	Cr.
1826, <i>January</i> 25.		
	<i>Ryle on Whitmore</i> , due 7th <i>March</i> ,	£ 240 0 0
	<i>Crowdson on Esdaile</i> - -	1500 0 0
		<hr/>
		1740 0 0
	Discount - - -	£ 10 3 9
	<i>Duff, Findlay, and Co.</i>	
	per desire - - -	829 16 3
		<hr/>
		840 0 0
		<hr/>
		£ 900 0 0
		<hr/>
		In

In the account current of Messrs. <i>Duff, Findlay, and Co.</i>			1829.
Dr.	Messrs. <i>Duff, Findlay, and Co.</i>	Cr.	BUCHANAN against FINDLAY.
	1826, January 25.		
	By <i>Duff and Brown</i> , per desire,	£829 16 3	

The defendants, in the month of *April* following, made entries in their journal and ledger in the same manner as the above, to the respective accounts of *Duff* and *Brown*, and of *Duff, Findlay, and Co.*, and such entries still remain. It has always been the practice of the defendants to enter, in the first instance, all remittances in their bill book and account current book as the transactions take place, and afterwards to make entries in their other books. The defendants did not in fact discount the bills for 1740*l.*, but retained them in their hands until they became due, when they received the amount thereof. This receipt was previous to the commencement of this action.

Patteson for the plaintiffs. The two bills, amounting to 1740*l.*, were remitted by the bankrupts to the defendants on a specific account. They were to be discounted, and the proceeds were to be appropriated in a particular mode; and under such circumstances the defendants had no right to them, *Humphries v. Wilson* (a). The property in the bills sent, until discounted, remained in the senders, *Giles v. Perkins* (b), *Thompson v. Giles* (c). The case of *Toovey v. Milne* (d) is a strong authority for saying that when a payment is

(a) 2 *Stark. N. P. C.* 566.(b) 9 *East*, 12.(c) 2 *B. & C.* 422.(d) 2 *B. & A.* 683.

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against
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made with a trust attached, and the object of the payment fails, the money remains the property of the party paying it. If the defendants had it in their power to execute the trust attached to the bills, and did not, the plaintiffs are entitled to recover them, according to *Key v. Flint (a)*. If, on the other hand, the defendants stated truly that they could do nothing with the bills, they ought to have sent them back. That they did not do; and the commission against *Duff* and *Brown* having issued before the bills became due, the money afterwards received on them by the defendants was money had and received to the use of the assignees. The defendants cannot insist that this was a case of mutual credit; for in all cases of mutual credit the transaction must be such as will terminate in a cross debt, *Rose v. Hart (b)*, *Ex parte Flint (c)*. And the judgment of the Court in *Easum v. Cato (d)*, and *Sampson v. Burton (e)*, proceeded on that principle. This transaction never could have terminated in a cross debt; for the bills were remitted with directions to apply the whole of the proceeds to particular purposes. The only doubt is as to the sum of 829*l.* 16*s.* 3*d.* entered to the credit of *Duff, Findlay, and Co.*, and if money instead of bills had been remitted, that might have been a sufficient appropriation to them; but as these bills were never discounted, no part of the proceeds can be considered as appropriated. This difficulty does not arise as to the remainder of the amount of the bills; and there can be no right of set-off, as the bills became due and the

(a) 8 Taunt. 21.

(b) 8 Taunt. 499.

(c) 1 Swanst. 30.

(d) 5 B. & A. 861.

(e) 2 B. & B. 89.

money

money was received by the defendants after the bankruptcy of *Duff* and *Brown*.

1829.

BUCHANAN
against
FINLAY.

Campbell contra. With respect to the 829*l.*, it is clear that there was an appropriation with the assent of the bankrupts. It appears by the correspondence set out in the case, that the bankrupts had promised remittances before the bills for 1740*l.* were sent. With respect to the residue of the demand, the assignees by bringing an action for money had and received, treat it as a mere pecuniary demand, and against that the defendants are entitled to a right of set-off. Suppose the defendants had discounted the bills, and, having received the proceeds, refused to pay over the 900*l.*; if the bankrupts had brought an action to recover back the money, the defendants would certainly have had a right of set-off notwithstanding the directions that accompanied the bills, *Cornforth v. Rivett* (a), *Lechmere v. Hawkins* (b), *Eland v. Karr* (c), where, in assumpsit for goods sold and delivered, it was held to be no answer to a plea of set-off, that the goods were sold for ready money. The effect of the bankruptcy was not to deprive the defendants of this answer to the action: the bills were to be converted into money, and, therefore, the transaction would end in a debt; consequently it makes a perfect case of mutual credit. *Rose v. Hart* only decided that mutual credit must arise out of a money demand: it was intended to correct *Olive v. Smith* (d), where the doctrine of mutual credit was treated as applicable to all cases of lien. Here the

(a) 2 M. & S. 510.

(c) 1 East, 375.

(b) 2 Esp. 625.

(d) 5 Taunt. 56.

1829.

BUCHANAN
against
RINDLAY.

demand must have been of a pecuniary nature, and under the 6 G. 4. c. 16. s. 50. constitutes a case of mutual credit. The bankrupts sent the bills to the defendants to obtain payment; they therefore entrusted the defendants with the bills: and the defendants, on the other hand, trusted the bankrupts to a very large amount. That was clearly a mutual credit. The case of *Humphries v. Wilson* was in trover, not money had and received; and there an actual fraud had been committed. In *Toovey v. Milne* no question of set-off or mutual credit arose: but there are several cases which shew that where a bankruptcy intervenes, and alters the situation of the parties, a set-off is let in notwithstanding an actual contract to pay the money, *Atkinson v. Elliott (a)*, *Chalmers v. Page (b)*, *M^cGillivray v. Simpson (c)*, *Michaelmas term 1826*, not reported.

Patteson in reply. It does not appear that in any of those cases the money was received after the bankruptcy: they are not, therefore, authorities for the decision of this. In the other class of cases, where a set-off was allowed notwithstanding a promise to pay ready money, the Court considered the debt then due as ready money.

Cur. adv. vult.

(a) 7 T. R. 378.

(b) 3 B. & A. 697.

(c) This was an action by *M^cGillivray*, assignee of *Inglis* and Co., bankrupts, against the defendant, a broker, for the proceeds of some timber sold by him on account of the bankrupts. It appeared that the timber was placed in the hands of the defendant for sale, upon his promising to pay over the proceeds to *Inglis* and Co., deducting his commission. The defendant sold the timber, and then claimed to retain out of it a debt due to him from the bankrupts, and it was held that he might do so.

Lord

LORD TENTERDEN C. J. now delivered the judgment of the Court; and after stating the facts of the case, proceeded as follows:—

1829.

BUCHANAN
against
FINDLAY.

In the argument on this case the defendants insisted that they had a right to set off the debt owing to them by the bankrupts, against the 900*l.* which they were directed to pay to Messrs. *Ransom* and Co.; to retain the amount of the discount on the bills, or set it off in like manner; and to place the difference to the credit of the former firm of *Duff, Findlay, and Co.*, as directed by the letter in which the bills were remitted to them. The questions were, whether they were entitled to the set-off as to one part, or to insist upon the application as to the other part: the plaintiffs contending that they were not entitled to either, and claiming the whole produce of the bills.

All the cases that bear upon the subject were quoted in the argument. The case nearest to the present in matters of fact, is that of *Key and Others v. Flint (a)*, which was also before the Lord Chancellor in *Ex parte Flint (b)*. Indeed, there is no substantial distinction between that case and the present, except in the form of action, which in that case was trover for the bill of exchange which then remained in the hands of *Flint* overdue and unpaid; whereas the present action is for money had and received to the use of the plaintiffs, the bills of exchange having been paid to the defendants after the commission. But if the bankrupts could have maintained trover for these bills, or if the plaintiffs could have maintained an action in that form, they may waive the wrong, and maintain the action in its present

(a) 8 *Taunt.* 21.

(b) 1 *Swans.* 30.

form. A lien before payment, and a set-off after payment of the bills, are to be governed by the same rules.

We think the cases cited on behalf of the defendant are all distinguishable from the present. In some of them a set-off was allowed against the price of the goods sold, notwithstanding a promise at the time of the sale to pay ready money to the bankrupt for them. In those cases the bankrupt should have insisted upon receiving the money before he parted with the goods; by parting with them he immediately raised a case of mutual credit and cross demands. In *Chalmers v. Page (a)*, the policies of insurance were delivered to the defendant, that he might receive the money upon them: he was not a wrong-doer by retaining the policies. The unreported case of *McGillivray v. Simpson* was of the same kind; goods were placed in the defendant's hands for sale: his sale of the goods was not a wrongful act. In *Atkinson v. Elliott (b)*, the bill of exchange was placed in the defendant's hands, that he might receive the money upon it when due; no offer was made, before it fell due, to pay him the sum which it was intended he should retain out of it: he was not a wrong-doer by keeping it and receiving the money upon it. In each of these cases the claim was for money; the breach of the contract consisted only in the non-payment of money. But in the present case, as in the case of *Flint*, the bills were sent to the defendant for a specific purpose; and as soon as the defendant declined to perform that purpose, the right to retain the bills ceased, and the party was legally bound to restore them on demand. The lien arising out of the deposit in the

(a) 3 B. & A. 697.

(b) 7 T. R. 378.

case of *Flint*, was satisfied before the action was brought: in the present case no lien was created by the original transaction, in which it was never intended that the defendants should hold the bills. The bills were sent to the defendants, that they might procure them to be discounted without delay, and make an immediate application of the proceeds according to the directions contained in the letter in which the bills were sent to them. They did not procure them to be discounted; and as soon as the bankrupts knew that this was not done, they required the defendants to return the bills. The bankrupts had a right to make this demand. If goods or bills are deposited for a specific object, and the bailee will not perform the object, he must return them, the property of the bailor is not divested or transferred until the object is performed. If, in the present case, the defendants had procured the bills to be discounted as directed, and paid over the 900*l.* to *Ransom* and Co., they would have been entitled to the benefit of the difference, and to apply it to the account of *Duff, Findlay*, and Co. But as they did not procure the bills to be discounted, nor pay the 900*l.*, the bankrupts had a right to a return of the bills; and the defendants cannot have the benefit of that partial application of their value, to which they would have been entitled if they had followed the directions of the bankrupts in other respects. If they could be permitted to do this, they would receive the benefit without performing the consideration for it; which would be very unreasonable. For these reasons, we think the verdict is to stand for the whole sum.

Postea to the plaintiff.

1829.

BUCHANAN
against
FINDLAY.

1829.

Monday,
July 6th.

**SURTEES and Another, Assignees of the Estate
and Effects of a Bankrupt, against ELLISON.**

Evidence of a trading which ceased before the 6 G. 4. c. 16. took effect, will not support a commission of bankrupt issued after that time.

ASSUMPSIT against the late sheriff of *Durham* for money had and received to the use of the plaintiffs as assignees. Plea, non assumpsit; and notice was given to dispute the trading and act of bankruptcy. At the trial before Lord *Tenterden* C. J. at the *London* sittings after *Trinity* term 1828, it appeared, that before and during the year 1828 the bankrupt had carried on business as a seed-merchant, and during that period had contracted a debt of 100*l.* to the petitioning creditor; but he had not actually carried on trade after that time. In the month of *August* 1827, he committed an act of bankruptcy by keeping house; and a few days afterwards the sheriff, under a *fi. fa.* at the suit of *H. J.*, seized and sold his goods to the value of 2300*l.*, and paid over the money to the execution creditor after notice of the act of bankruptcy. For the defendant it was contended that the commission could not be supported, inasmuch as there was no trading after the 6 G. 4. c. 16. was passed. Lord *Tenterden* reserved the point, and the plaintiff had a verdict, subject to a motion for entering a nonsuit. A rule nisi for that purpose was granted in *Michaelmas* term 1828, against which

The *Attorney General*, *Alderson*, and *Cresswell*, now shewed cause. There was a sufficient trading to support this commission after the passing of the 6 G. 4. c. 16. It is
not

1829.

**SURTES
against
ELLISON.**

which subjects him to a commission of bankruptcy, it is reasonable to say that he shall not be allowed to shake off that character until he has paid the debts so contracted. And this is the only intelligible reason that can be given, for holding that a party ceasing to trade is liable to a commission on the petition of a party who became a creditor during the trading, and not on the petition of one who became so afterwards; which distinction has been established by several cases, *Sir Job Harve's case (a)*, *Cotton v. Daintry (b)*, *Sir Thomas Bateman's case (c)*, *Meggott v. Mills (d)*.

Brougham (and *Chitty* was with him), contra, was stopped by the Court.

Lord TENTERDEN C.J. The rule for entering a nonsuit in this case must be made absolute. It has been long established, that, when an act of parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed. That is the general rule; and we must not destroy that, by indulging in conjectures as to the intention of the legislature. We are therefore to look at the statute 6 G. 4. c. 16. as if it were the first that had ever been passed on the subject of bankruptcy; and so considering it, we cannot possibly say that there was any sufficient trading to support the commission. It is certainly very unfortunate, that a statute of so much importance should have been framed with so little attention to the consequences of some of its provisions. It is said that the last will of a party is to be favourably construed, be-

(a) 1 Ventr. 5.

(b) 1b. 29. 1 Sid. 411.

(c) Ventr. 166.

(d) 1 Ld. Roy. 286.

cause

*Key v. Goodwin
June 1829*

cause the testator is inops consilii. That we cannot say of the legislature; but we may say that it is "magnas inter opes inops."

1829.

SUTHERS
against
ELLISON.

BAYLEY J. Before the time when this commission issued, all the old bankrupt laws had ceased to exist. But it has been contended in argument, that we must consider the trading by the supposed bankrupt as existing until his debts were paid. I think, however, that the fair result of the cases cited is only that the party was not exonerated from his liability to the bankrupt laws by ceasing to trade, and not that the trade was considered as continuing. Here the party, except as to the non-payment of his debts, ceased to have any thing to do with trade long before the present bankrupt law existed. I am, therefore, of opinion that he is not subject to it.

LITTLEDALE J. In the instances cited, the same bankrupt law was in existence when the debt was contracted and the act of bankruptcy was committed, which makes an essential difference between those cases and the present.

PARKE J. The only question is, whether the bankrupt came within the 6 G. 4. c. 16. s. 2. It is said that, according to *Meggott v. Mills*, and *Ex parte Bamford*, he continued a trader at the time of the act of bankruptcy. But I think that those cases decided nothing more than that the trading and act of bankruptcy need not be contemporaneous. They do not warrant us in treating this person as a buyer and seller by construction; he was not, therefore, a trader after the 6 G. 4. c. 16. passed,
and

1829.

Suttons
against
Ellison.

and consequently cannot be subject to its provisions. The rule for entering a nonsuit must, therefore, be absolute.

Rule absolute. (a)

(a) HEWSON v. HEARD.

As soon as the case of *Suttons v. Ellison* had been decided, this case was called on, in which the question was, whether a commission issued after the 1st of September 1825, when the 6 G. 4. c. 16. took effect, could be supported by proof of an act of bankruptcy committed before the passing of that act; when the *Attorney-General* and *Chitty* admitted that they could not support the commission.

PALMER, Assignee, v. MOORE.

This case was argued at the sittings in banc. after last term. The act of bankruptcy proved at the trial was a conveyance of all the trader's effects, after the 2d of May 1825, when the 6 G. 4. c. 16. was passed, but before the 1st of September 1825. A verdict was found for the plaintiff, subject to a case reserved upon that point.

Clarkson, for the plaintiff, contended, that although the statute was not to take full effect so as to authorise the issuing of a commission before the 1st of September 1825, yet as it was in existence, and had some operation by repealing former acts before the time when the act of bankruptcy was committed, that sufficed to support a commission sued out after the act took full effect. The declared intention of the legislature was to consolidate the laws relating to bankrupts, and not to abolish them for the time intervening between the 2d of May and the 1st of September 1825. The Court of C. P. certainly came to a different conclusion in *Maggs v. Hunt* (4 Bing. 212.) ; but that case appears to have undergone very little discussion, and no satisfactory reasons are assigned for the judgment of the Court.

Chitty, contra, was stopped by the Court.

BAYLEY J. It is certainly to be lamented that the legislature made no provision for issuing commissions, after the 6 G. 4. c. 16. came into operation, upon acts of bankruptcy previously committed. But there are no words in the statute to authorise such a proceeding. At the time when that statute was passed, the 5 G. 4. c. 98., which had repealed all former bankrupt acts, was in force : that was repealed by the new act from the time when it passed ; and that repeal had the effect of setting up the old

acts

acts during the interval between the 2d of May and the 1st of September 1825, and under them a commission might have issued. But from the 1st of September 1825 they ceased to exist, and the powers given by them were then extinguished. All the words of the third section of the new act, describing what shall be deemed acts of bankruptcy, are prospective, and relate to things to be thereafter done; no distinction being made between those acts which were acts of bankruptcy under the old acts, and those which were first declared to be so by the 6 G. 4. c. 16. For these reasons, I am of opinion that this commission cannot be supported.

LITTLEDALE and PARKE J^s. concurred.

Restes to the defendant.

1829.

SENTENCE
against
EKLSON.

Reinisch v. Powell. 5 M. & W. 479.
Thomas v. The Mayor of Swansea 11 M. & W. 23

HARBIN, Gent., one, &c. against MILES.

THE plaintiff brought an action to recover the amount of his bill of costs from the defendant. The same was afterwards referred to the Master for taxation, and upon such taxation more than a sixth part had been taken off. The defendant had obtained a rule that the plaintiff should pay the costs of taxation. In *Easter* term,

Where a Judge's order for taxing an attorney's bill is not obtained until after he has commenced an action for the amount, the defendant is not entitled to the costs of taxation, although more than one sixth is taken off by the Master.

F. Pollock and *Platt* shewed cause. The Judge's order not having been obtained until after the plaintiff commenced his action, the defendant is not entitled to the costs of taxation, *Benton v. Bullard (a)*, *Jay v. Coaks (b)*.

The *Attorney-General* and *Campbell*, contra. The words of the statute 2 G. 2. c. 23. s. 23. are imperative on the courts to allow the client the costs of taxation of an attorney's bill, where one sixth has been taken off,

(a) 4 Bing. 561.

(b) 3 B. & C. 635.

whether

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HARRIS
against
MILES.

whether the rule for taxation be obtained before or after action brought. Section 23d authorises the courts or a Judge to refer the bill to taxation, *although no action or suit shall be then depending*. It is clear, therefore, that they may refer although an action be depending, and the courts are to award the costs of such taxation to be paid by the parties according to the event of such taxation; that is, if the bill taxed be less by a sixth part than the bill delivered, the attorney is to pay the costs of taxation. Now, the words of the statute are general, and do not restrain the power given to cases where the bill is taxed before action brought; and the practice has been, until the late decisions in *Benton v. Bullard* (a) and *Jay v. Coaks* (b), to allow the costs of taxation to the client, whether the bill has been taxed before or after action brought. This case has been brought before the Court, in order that the decision in *Jay v. Coaks* may be reconsidered. In *Hullock's Law of Costs*, p. 515., the rule is laid down generally: — “If the sixth part of a bill delivered by an attorney be deducted upon its being referred to be taxed, the 2 G. 2. c. 23. s. 23. in express terms subjects the attorney to the payment of the costs occasioned by the taxation;” and he then cites *Barker v. The Bishop of London and Others* (c), where it is said by the Court, “If a sixth part of an attorney’s bill be deducted, we have no discretion under the statute 2 G. 2., but are obliged to award costs of taxation against the attorney; but where less than a sixth part is deducted, we have a discretionary power of charging either the attorney or client with those costs.” And in *Higgins v. Woolcott* (d),

(a) 4 Bing. 561.

(b) 8 B. & C. 635.

(c) 28 G. 2. 2 Barnes, 147.

(d) 5 B. & C. 760.

Lord

Lord *Tenterden* lays it down that where the bill taxed is less by a sixth part than the bill delivered, the attorney is to pay the costs of the taxation; the words of the statute are imperative. The consequence of holding that the attorney is not bound to pay the costs of taxation, where it is after action brought, will be, that attorneys will commence actions immediately upon the expiration of the month, in order to save themselves the costs occasioned by taxation. Clients will thereby be deprived of the only means in their power of ascertaining the amount they are really indebted to the attorneys except at their own expense.

Cur. adv. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court; and after stating the facts of the case, and the point made, proceeded as follows:—

We have considered this case, and are of opinion that where the attorney has delivered a bill a month before he brings the action, and the client thinks proper to wait until the action be brought, without taxing the bill, he is not entitled to the costs of such taxation made after action brought, although more than a sixth be taken off the bill.

Rule discharged. (a)

(a) On a subsequent day in this term the same question was again agitated, in a case of *Coates v. Nash*, when the Court adhered to the opinion expressed above.

1829.

Monday,
July 6th.

CARR *against* STEPHENS.

A receiver of the rents of an estate, to a share of which a married woman was entitled, having in his hands money due to her, by the direction of the husband, accepted a bill on the faith of that fund, drawn by a creditor of the husband for money lent to him. Before the bill became due the husband and wife gave a joint direction to the receiver to pay over the money to a third person, which he did before the commencement of this action. When the bill became due the acceptor refused to pay it, unless the drawer would indemnify him against the claim of the husband and wife to have the money paid according to their order. An indemnity was given, but the acceptor still refused to pay: Held, that the drawer could not maintain an action on the bill, as it would only lead to a circuitry of action, as the acceptor, being bound to pay the money according to the order of the husband and wife, might recover it back by suing on the agreement to indemnify.

ASSUMPSIT on a bill of exchange for 189*l.*, drawn by the plaintiff, and accepted by the defendant, and for money had and received. Plea, non assumpsit. At the trial before Lord *Tenterden* C. J., at the *London* sittings after *Trinity* term 1828, it appeared that the plaintiff had acted as the solicitor for Mr. and Mrs. *H.*, the latter of whom was entitled to a share of certain real estates under the will of her father. A suit in equity had been instituted to carry into effect the trusts of that will, and the defendant was appointed receiver of the estates. In 1826 he passed his accounts as receiver, and then had in his hands a sum of money, of which Mrs. *H.*'s share was near 300*l.* The plaintiff then had a claim on Mr. *H.* for 149*l.*, for money lent, and there was due to him from the defendant 40*l.* for business done for him as receiver, and for these two sums the acceptance was given with the concurrence of Mr. *H.*, but without any authority from his wife. Before the bill became due, Mr. and Mrs. *H.* demanded the money from the defendant, which he had received on her account, and he afterwards, and before the commencement of this action, paid it to their agent. When the bill became due, the defendant at first asked indulgence, but afterwards refused to pay it unless the plaintiff would give him an indemnity against any proceedings for the money by Mr. and Mrs. *H.*, to which he agreed. The indemnity was given; the defendant afterwards refused to pay the bill; but paid into

court

court a sum more than sufficient to cover all that was due from him to the plaintiff, on his own account. For the defendant it was contended, that as he had accepted the bill without any authority from Mrs. H., and she had afterwards required the money to be paid to a third person, the plaintiff could not recover it, notwithstanding the acceptance given by the defendant. Lord *Tenterden* thought that the plaintiff was entitled to recover, and that the defendant must resort to the indemnity for reimbursement. In *Michaelmas* term a rule nisi was granted for entering a nonsuit ; against which,

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CARR
against
STEPHENS.

The *Attorney-General* and *Patteson* now shewed cause ; and contended that the defendant, at the time when he accepted and promised to pay the plaintiff, was aware of all the facts of the case, and was, therefore, bound by his acceptance. That if under such circumstances he had actually paid the money to the plaintiff he could not have recovered it back, and therefore ought not to be allowed to resist an action brought on the security which he had given for it.

Gurney and *D. Pollock*, contra, contended, that as the plaintiff, when he advanced the money to Mr. H., had not done so upon an express agreement by Mr. and Mrs. H. that he should be repaid by the money in the defendant's hands, they might afterwards give a valid order to another person to receive it, and the defendant was bound by that order. The plaintiff, therefore, had no right to recover that money, and the bill, consequently, was, as to that part of it, given without consideration : the residue of the amount was paid into Court, and the plaintiff, therefore, was not entitled to recover any thing at the trial.

BOTTINGS *against* FIRBY and HUMPHRY (a).

Where a cause is removed by habeas corpus from an inferior court after judgment by default, that judgment is not evidence against the defendant in the superior court.

ACTION on the case for an excessive distress and distraining for more rent than was due. Plea, not guilty. At the trial before Lord *Tenterden* C. J., at the *Middlesex* sittings after last term, the plaintiff proved a record of a judgment by default upon the same declaration, between the same parties, in the Palace Court, from whence the cause had been removed by habeas corpus, and contended that it was an admission by the defendants of their liability upon the present trial. It appeared by the cross-examination of the witness who made up the record that he had never seen the defendants in the Palace Court, and that he entered the formal statement that the defendants in their proper persons came and said nothing in bar of the said action, in consequence of their default in not filing a plea in time. Upon this Lord *Tenterden* said that the judgment by default came to nothing; that it appeared that the defendants having let slip the time for pleading in the inferior court had removed the cause into this court, and had here pleaded; and that the record contained no admission at all. A verdict was found for the defendants.

Erle now moved for a new trial. A judgment by default between the same parties, upon the same issue, is an admission by the defendant of his liability, and it ought to have been left to the jury to decide whether the judgment arose from mistake or accident in the de-

(a) This case was moved in the first four days of the term.

fendants,

defendants, or was at the time a declaration that they had no defence which they were afterwards desirous of withdrawing. A judgment by default is clearly a conclusive admission in the same action; it is also a conclusive admission in a second action founded on the first. In trespass for mesne profits the record in ejectment is conclusive proof of the possession of the defendant; and there is no difference between a judgment by default and after verdict. *Astlin v. Parkin* (a), *Vooght v. Winch* (b), and *Evelyn v. Haynes* (c), are instances of judgments in former actions being evidence, though not conclusive, in other actions. The present was rather the same than a second action. Besides, if the defendants had declared in the court below that they had no defence, parol evidence might have been given of such an admission; but by abstaining from pleading there, they did an act to which the law attached the effect of an admission, and they must be taken to know the law, or at least cannot avoid the consequences of their ignorance of it, *Bilbie v. Lumley* (d), *Lowry v. Bourdieu* (e).

Lord TENTERDEN C. J. If any weight had been given to the judgment by default, great injustice might have been done to the defendants. For they may in the first instance have intended to remove the cause into this court, and therefore have suffered judgment by default. I think they ought to have their trial unprejudiced by the proceeding in the court below. The effect of holding the judgment by default in the inferior court to be an admission of a cause of action by the defendants

(a) 2 Burr. 668.

(b) 2 B. & A. 662.

(c) Cited in 3 East, 365.

(d) 2 East, 468.

(e) Doug. 467.

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BOTTING
against
FIRBY.

would be to turn the trial in the superior court into an execution of a writ of enquiry.

BAYLEY J. I think this judgment was not receivable in evidence at all. The habeas corpus superseded the judgment of the Palace Court.

LITLEDALE J. The plaintiff cannot avail himself of the judgment by default by reason of the removal. That being so, both parties must be considered in the same situation as if no such judgment had been given.

PARKE J. If the judgment by default had been set aside upon payment of costs, it would not have been evidence against the defendants. The legal effect of removing the cause by habeas corpus is the same as if the judgment by default had been set aside.

Rule refused.

Wednesday,
July 8th.

JONES and Others, Assignees of SYKES and BURY, Bankrupts, against FORT.

Where bills of exchange were delivered by a trader, in contemplation of bankruptcy, to a creditor, with a view of giving him the preference, and the amount due on the bills

was received by him after the bankruptcy: Held, in an action of trover by the assignees to recover the bills, that the receipt of the money by the creditor was not a conversion, and, therefore, that it was necessary for them to prove a demand and refusal before the bills became due.

THE first count of the declaration charged, that the defendant deceitfully obtained possession of five bills of exchange under the pretence of discounting them. The remaining counts were in trover, alleging a conversion after the bankruptcy. Plea, not guilty. At the trial before Lord *Tenterden* C. J. at the *London*

sittings,

sittings after *Trinity* term 1828, it appeared that the action was brought to recover five bills of exchange delivered by the bankrupts to the defendant on the 23d of *July* 1825, as the plaintiffs alleged, in contemplation of bankruptcy. One was drawn on *James Hunter* and Co., due the 23d *July* 1826, for 3000*l.*; another on *M'Lachlan* and Co., due the 21st *October* 1826, for 1500*l.*; and three others, each 500*l.*, on *Thomas Ferguson*, two of which were due 29th *November* 1826, the other the 5th *November* 1826. *Sykes* and *Bury* committed an act of bankruptcy on the 28th *November* 1825, and on the 30th a commission issued against them, under which they were duly declared bankrupts, and the plaintiffs were appointed assignees. It appeared that *Fort* had received the amount of some of the bills when they became due. It was proved, on the part of the plaintiffs, that after the bills became due, on the 23d of *October* 1827, a person employed by the assignees as accountant to the estate demanded the bills from the defendant on account of the assignees. The defendant referred the accountant to his attorney, but the accountant did not apply to the attorney. And it was thereupon contended, on the part of the defendant, that the demand having been made after the bills became due was not sufficient, and that the answer of the defendant did not amount to a refusal. The plaintiffs contended, that the receipt of the money, due on the bills, by the defendant was an actual conversion, and, therefore, that it was unnecessary to prove a demand and refusal. Lord *Tenterden* thought there was no evidence of a demand made, before the bills became due, or of any refusal by the defendant to deliver up the bills, and that the receipt of the money,

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JONES
against
FORT.

as

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against
FOUR.

as it became due on the bills, was not an actual conversion, but said he would reserve liberty to the defendant to move to enter a nonsuit in case a verdict should be found for the plaintiffs. The cause then proceeded; and Lord *Tenterden* directed the jury to find for the plaintiffs, if, upon the evidence, they thought the bills had been delivered by the bankrupts, in contemplation of bankruptcy, to the defendant with a view of giving him a preference. The jury found for the defendant on the first count, and for the plaintiffs on the counts in trover; and a verdict was ultimately entered for the plaintiffs for 3500*l.*, the defendant undertaking to deliver to the plaintiffs such of the bills as remained in his hands unpaid. A rule nisi had been obtained for entering a nonsuit, on the ground that there was no evidence of a conversion; and *Nixon v. Jenkins* (a) was cited, where there was a collusive sale of goods by a trader on the eve of bankruptcy; and it was contended that a demand and refusal were necessary only in cases where the possession was originally lawful; that in the case then before the Court there was a wrongful possession, inasmuch as the bankrupt had no right to make a fraudulent sale of his effects in order to cheat his creditors; but the Court held, that when the sale was made the parties were competent to contract; there was no unlawful taking of the goods, though the transaction was liable to be impeached by the assignees: they might either affirm or disaffirm the contract; and if they thought proper to disaffirm it, they ought to have demanded their goods, — a refusal to deliver which would have been evidence of a conversion.

(a) 2 H. BL. 135.

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The *Attorney-General, Platt*, and *J. Evans*, on a former day in this term showed cause. The receiving the money by the defendant was an actual conversion of the bills. It was not necessary, therefore, to prove any demand and refusal. That is only evidence from which a jury may presume a conversion. All the bills became due, and the money was received after the act of bankruptcy; therefore the conversion was after the act of bankruptcy. In *Nixon v. Jenkins* (a) no conversion whatever was proved; and in the absence of such proof it was necessary to shew a demand and refusal.

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JAMES
against
FORT.

F. Pollock, contra. In order to recover in trover the plaintiffs were bound to prove either an actual conversion of the bills by the defendant, or a demand and refusal (which are evidence of a conversion) during the time the bills remained in his possession. There was no proof of any demand and refusal before the bills became due, and the defendant had received the money. Nor was there any refusal to deliver up the bills in answer to the demand proved, for the defendant only referred to his attorney: that was not a refusal. The receipt of the money, and the delivery of the bills to the person who paid it, was not a wrongful conversion of the bills. The delivery of the bills to the defendant was lawful at the time it was made; his possession was, therefore, lawful. Non constat that the assignees would disaffirm the act of the bankrupt; and until they did, the defendant, as the holder of the bills, was not only entitled to obtain and receive payment, but would have been guilty of a breach of duty if he had not done

(a) 2 H. Bl. 135.

so. The receipt of the money when the bills became due, and the delivery of them to the persons who paid them, was an act done by the defendant, not in the exercise of any right, but in the discharge of a duty. It clearly, therefore, was not a wrongful conversion. *Nixon v. Jenkins* (a) is in point. The assignees, if entitled to the produce of the bills, should have brought money had and received.

Cur. adv. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court.

In this case a rule was obtained for entering a non-suit, on the ground that there had not been before the action, and within such time as was necessary, a demand of the bills and a refusal. No demand had been made till after the bills became payable, and the money due on them had been received by the defendant. It was contended, in support of the action, that the receipt of the money by *Fort*, when the bills became due, was in itself a conversion. But we are of opinion that it was not, because the bills being in the hands of *Fort*, it was his duty to receive the money when due, to whomsoever it might belong; and it would, according to the finding of the jury, have belonged to the assignees. But in this form of action they cannot recover without proving an actual conversion or a demand (made within proper time) and a refusal, which are evidence of a conversion. The rule for entering a nonsuit must, therefore, be made absolute.

Rule absolute.

(a) 2 H. Bl. 135.

1829.

PHILLIPS, Assignee, &c., *against* DANCE.Wednesday,
July 8th.

THE plaintiff had carried the record down to trial. There not being a full special jury, neither party prayed a tales. The cause was not tried. The plaintiff never afterwards moved. The defendant obtained a rule nisi for judgment, as in case of a nonsuit, which was discharged upon a statement of the above facts. The defendant then obtained a rule for trial by proviso. A rule nisi having been obtained for setting that rule aside,

Where, upon a special jury cause being called on for trial there was not a full special jury, and neither party prayed tales, the defendant cannot afterwards take down the record by proviso.

Chitty now shewed cause. The defendant has a right to try by proviso, for he cannot obtain judgment as in case of a nonsuit. He has no other remedy. The plaintiff should carry the record down again, or allow the defendant to do so.

Barstow, contra. The rule for the trial by proviso assumes that there has been a default in the plaintiff. The form of the rule is, "Let there be a record of nisi prius by proviso, if the plaintiff shall have made default." There has been no default in the plaintiff, for he gave the defendant an opportunity of trying the cause if he would. In *Jenkins v. Purcel* (a), whilst the jury were being sworn, the defendant's counsel called for the record, and finding a mistake in it said they would make no defence. The plaintiff's counsel, upon this, in order to

(a) 2 Str. 707.

avoid

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PHILLIPS
against
DANCE.

avoid a nonsuit and to save the costs, refused to pray a tales; and though twelve had been sworn, yet there had been no actual prayer of a tales, and the cause was suffered to remain for want of jurors. That was two years before the statute 14 G. 2. c. 17., which gives the defendant no additional advantage. It only provides that where the plaintiff has made default, there may be the like judgment for the defendant as in case of a nonsuit.

Lord TENTERDEN C. J. There is no default in the plaintiff, where neither party prays a tales. The defendant, therefore, is not entitled to try by proviso.

Rule absolute.

Monday,
July 6th.

ANN SAMMON against MILLER.

In January 1819, *A.* had been discharged under the then insolvent debtors' act, 53 G. 3. c. 102. In the schedule, *B.* was described to be a creditor in respect of 2000*l.* five per cent. Navy bank annuities lent by *B.* to the defendant, and to secure the replacing of the stock on the 9th of October 1820, and the payment of the dividends in the mean time, *B.* held *A.*'s bond, and a warrant of attorney, upon which judgment had been entered up. *B.* afterwards held *A.* to bail upon the judgment: Held, that *A.* was entitled to be discharged on filing common bail under the twenty-ninth section of the 53 G. 3. c. 102., which enacted, "that no prisoner who shall have obtained his discharge shall be imprisoned by reason of any judgment or decree obtained for payment of money, or for any debt incurred, and with respect to which such discharge shall have been obtained."

THE defendant, on the 28th of January 1819, had been discharged by the usual order under the insolvent debtors' act then in force, 53 G. 3. c. 102., as to all the creditors named and specified in the schedule. The plaintiff was a creditor mentioned in the schedule, in respect of 2000*l.* five per cent. Navy bank annuities lent by her to the defendant several years before. To secure the replacing of the stock on the 9th of October 1820, and the payment of the dividends in the mean time, the plaintiff held the defendant's bond, and a warrant of attorney had also been given, upon which

judgment

judgment was entered up in *Michaelmas* term 1818, and the arrears of the dividends had been levied. The defendant had recently been arrested, and held to bail in an action of debt upon that judgment entered up in 1818, and a rule nisi was obtained for discharging him out of custody on filing common bail; against which

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against
MILLER.

Steer now shewed cause. On the 28th of *January* 1819, when the defendant was discharged under the insolvent debtors' act, the sum now sought to be recovered by the plaintiff was not "a debt, damages, or sum of money contracted, incurred, occasioned, owing, or growing due" within the meaning of the 53 G. 3. c. 102. s. 29. The time for replacing the stock had not arrived, and would not arrive until the 9th of *October* 1820, and there was no dividend in arrear. It might have been different had the defendant's discharge taken place under the recent insolvent debtors' act, which applied the principle of the modern bankrupt laws to contingent debts and unliquidated demands for which insolvents were liable, and allowed them to ascertain their amount in the same manner, in order that they might insert them in their schedules. But there was no such provision in the statute under which this defendant was discharged, and therefore he cannot have the benefit of it. Suppose this insolvent, shortly after his discharge, had become possessed of property which his assignee had afterwards seized for the benefit of his creditors, the present plaintiff would not have been permitted to participate therein, as there was nothing due to her at the date of his discharge. If there were no debt due from the defendant to the plaintiff, it follows that the defendant is not released or discharged from the debt in respect

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spect whereof he is now sued. In *Davies v. Arnott* (a) the obligors in a bastardy bond, discharged under the insolvent debtors' act subsequently to a judgment on the bond, were held to be liable for expenses incurred in respect of the bastard subsequently to their discharge. So in *Lloyd v. Peel* (b) a plea of discharge under the insolvent debtors' act was held to be no bar to an action of trespass for mesne profits, even though accruing before the discharge.

Comyn, contra. The 53 G. 3. c. 102. s. 29. enacts, "that no prisoner who shall have obtained his discharge shall be imprisoned by reason of any judgment or decree obtained for payment of money, or for any debt, &c. incurred with respect to which such discharge shall have been obtained." Here the defendant has been arrested by reason of a judgment obtained against him before his discharge under the insolvent act. The judgment was for payment of money. If it sounded only in damages, the plaintiff had no right to hold the defendant to bail, but ought to have proceeded by scire facias. The judgment was existing at the time of the defendant's discharge. The bond debt was merged in the judgment.

Lord TENTERDEN C. J. Before the party applied for his discharge judgment had been entered up on the warrant of attorney. There was a bond, with a penalty, for securing the principal and interest; and it was forfeited at the time when the defendant applied for his discharge under the insolvent act. It is contended, that

(a) 3 Bing. 154.

(b) 3 B. & A. 407.

if

IN THE TENTH YEAR OF GEORGE IV.
if the defendant had become bankrupt, the whole would
have been a debt proveable under his commission; and if
his certificate would have been a good discharge; and if
that be so, there seems to be no reason why, by analogy
to proceedings under a commission, it should not be con-
sidered a debt in respect of which he is entitled to be
discharged under the insolvent debtors' act. I think
the defendant is entitled to be discharged out of cus-
tody upon filing common bail. In making this rule
absolute, however, we shall not prevent the plaintiff from
proceeding in his action and raising the question (if he
think fit) upon the record, whether this was a debt in
respect of which the defendant was entitled to be dis-
charged by the 53 G. 3. c. 102.

LITTLEDALE J. (a) I think the defendant is en-
titled to his discharge on filing common bail. The judg-
ment was entered upon the warrant of attorney, and must
be enforced at the time when the defendant
be discharged.

PARKE J. I also am of opinion, that
ought to be discharged on filing com-
mon bail. I am inclined to think that the whole
of that debt by analogy to proceedings
against the insolvent, and that by
bankruptcy. The judgment
time when the defendant re-
quite clear, that a bond
given day may be prov-

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ruptcy, if by a breach of any of the conditions it be forfeited before the bankruptcy, *Parker v. Ramsbottom* (a).

Rule absolute.

(a) 3 B. & C. 257.

Reg. v. Saffron Walden 9. 2 B. 76.

LEIGH against HIND.

The assignor of a lease of a public-house in London, covenanted that he would not keep a public-house within the distance of half a mile from the premises assigned: Held, that the half mile, as mentioned in the covenant, imported half a mile measured by the nearest way of access between the premises assigned and any public-house afterwards kept by the assignor.

DEBT for 1000*l*. Declaration stated that, by an indenture of assignment of the 17th of December 1827, the defendant, for the consideration of 2550*l*. paid to him by the plaintiff, bargained, sold, assigned, transferred, and set over unto the plaintiff an indenture of lease, in the indenture of assignment recited; and also a messuage, tenement, and premises, with the appurtenances (being a public-house, called the *Black Lion*, in *Bishopsgate Street*), habendum for the residue of a term of twenty-one years; and the defendant by the assignment covenanted with the plaintiff, that in case he, the defendant, should at any time thereafter, during the continuance of the term by the lease granted, (provided the plaintiff should then occupy the premises thereby assigned, and be carrying on the business of a victualler therein,) keep any licensed victualling-house; or use or exercise, or be in any manner concerned, either directly or indirectly, in the trade or business of a victualler, *within the distance of half a mile from the said premises thereby assigned*; that then he, the defendant, his executors, &c. should within fourteen days after demand made, repay to the plaintiff, his executors, &c. the principal sum of 1000*l*., parcel of the

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LEIGH
against
HARD.

to the same, to a spot in the carriage-way, distant two feet and nine inches from the curb-stone, and proceeding along the carriage-way, in the nearest direction a carriage could take to a spot also distant two feet nine inches from the curb-stone, opposite to one of the door-posts of the *Southwark Bridge Tavern*, and passing from such last-mentioned spot to the curb-stone, and thence to the door way of the said tavern, by walking across the foot pavement, in a direction slightly inclining to the left hand; and a third measured from the centre of the doorway of the said *Black Lion* to the centre of the doorway of the *Southwark Bridge Tavern*, along the foot pavement and crossings for foot passengers. The arbitrator then adjudged the distance between the *Black Lion* and the *Southwark Bridge Tavern* to be according to the measurement first mentioned, 2627 feet and one inch; and according to the measurement secondly mentioned, to be 2638 feet; and according to the measurement lastly mentioned, to be 2695 feet; and he determined the *Southwark Bridge Tavern* to be within half a mile from the *Black Lion*, and the distance by the nearest mode of access between the said premises to be less than half a mile. The arbitrator then ordered the verdict taken for the plaintiff to stand. A rule nisi had been obtained for setting aside the award.

Gurney and *Pattison* shewed cause. The defendant by his covenant, has stipulated that he would not keep a public house within the distance of half a mile. The arbitrator has found that the house kept by the defendant is within half a mile from that of the plaintiff. He has, therefore, found in terms that the defendant has committed a breach of the covenant. If the defendant had intended to reserve to himself the right of keeping

keeping such a house, which, by the shortest mode of access, would be distant half a mile from the one he sold, he should have provided for that by his covenant. The words of the covenant should be construed according to their plain and ordinary import. If they be construed to mean half a mile by the shortest mode of access, this consequence may follow, that the distance, which at one time may be greater than half a mile, may, by reason of a new mode of access being made, (as by the opening of a new street, or in a case where the intervening space is water, by the building of a bridge,) be rendered less, and a party may thereby become guilty of a breach of covenant without any default on his part. Assuming, however, that, according to the true construction of the covenant, the shortest mode of access by the foot-pavement and by the carriage-way was the proper line of measurement, the defendant has broken his covenant, and the award is right; for the arbitrator has found that the shortest way of access, partly by the footpath and partly by the carriage-way, is less than half a mile.

1829.

 LATER
AGAINST
HISW.

The *Attorney-General* and *Chitty* contra. Covenants of this description are not to be favoured, *Crutwell v. Lye* (a), *Bozon v. Farlow* (b). They must be construed according to the intent of the parties, to be collected from the context of the instrument. The object of the covenant clearly was to prevent the defendant from interfering with the customers who frequented the house sold by him to the plaintiff. Now that being the manifest intent of the covenant, the distance of half a mile therein mentioned is not to be measured by a straight line drawn from house to house as the crow flies, but

(a) 17 Ves. 335.

(b) 1 Mer. 459.

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by that line which persons usually frequenting houses of this description would take in going from one house to the other. In the case of a walled town, one house situated on the outside of the wall might, as the crow flies, in fact be distant within a very few feet of another within the wall, yet a party going from the one to the other by the only practicable mode of access, i. e. by entering the town at one of the gates, would be compelled to traverse a considerable space. The usual way of access was that contemplated by the parties to this covenant. Now persons who frequent a public-house would not use the carriage-way, but the footpath only. The parties to this covenant must have contemplated the way of access by the footpath, and that, according to *Woods v. Dennett* (a), is the proper mode of admeasurement in such a case. [Lord Tenterden C. J. A person could not go from one house to the other entirely by the footpath; he must necessarily cross the streets three or four times.] They must take the shortest mode of access by the footpath as long as there is a footpath, and by the usual crossings for passengers where it is necessary to cross the streets.

LORD TENTERDEN C. J. The arbitrator, after having declared by his award that he had directed measurements to be made in three different ways, states the number of feet in each way, and then awards the *Southwork Bridge Tavern* to be within half a mile of the *Black Lion*, and the distance by the nearest mode of access between the premises to be less than half a mile. Now unless the nearest mode of access be taken, it is impossible to say what other mode should be taken. If we depart from it a little in this case, we may be

(a) - 2 Stark. 89.

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against
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had a good case, supposing the other to have been adopted. At all events, the point was not presented for Lord *Ellenborough's* consideration, and therefore his opinion is not to be considered an authority, against this construction, which appears to me to be the right one. But, assuming that this is not the true mode of construing the agreement, I think that is to be considered the nearest way of access which a person making the best of his way from house to house would be likely to take; that is, using the footway where there was one and where it was most convenient to use it, and the carriage-way either where it could be most conveniently used, or where there was no footpath. The arbitrator has found that the defendant's house, by the nearest mode of access, is within the distance of half a mile from the premises assigned. The rule for setting aside the award must, therefore, be discharged.

Rule discharged.

See Brandon v. Waine 7 Bing 216
... Hadley v. Green 2 G. & J. 274

Wednesday,
July 8th.

DUNN against MURRAY.

Declaration
stated, that in
consideration
that the plain-
tiff, at the re-
quest of the

DECLARATION stated, that on the 2d of *February*
1827, at, &c. in consideration that the plaintiff, at
the request of the defendant, would enter into the em-

ploy-
ment of the defendant, would enter into the employ of the defendant in a certain capacity for a year, at the rate of five guineas per week throughout the year, defendant undertook to employ him for a year, and alleged as a breach that the defendant dismissed the plaintiff from his employ before the end of the year without any reasonable or probable cause. The declaration contained counts for wages, and for work and labour, &c. The cause, which was commenced before the expiration of the year, was referred to an arbitrator, who awarded to the plaintiff a sum of money equivalent in amount to the wages he would have been entitled to receive from the defendant on the day when the action was commenced. No claim was made before the arbitrator for any compensation in damages for the dismissal, except so far as the special count in the declaration, and the evidence of the employment and the dismissal might amount to such a claim. The plaintiff having afterwards brought an action to recover a compensation in damages in consequence of the dismissal from the defendant's employ before the end of the year; it was held, that the award of the arbitrator was a bar to such action.

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ploy of the defendant in the capacity of a reporter of the proceedings of the Court of King's Bench, and also of proceedings in the House of Commons, and would furnish reports of such proceedings to the defendant, his servants or agents, for the purpose of publication in a public newspaper of the defendant for one whole year, to wit, from the day and year aforesaid, at and for a certain salary or wages, at the rate of five guineas per week throughout the year; the defendant undertook and faithfully promised the plaintiff, to retain and employ him, the plaintiff, in the capacity aforesaid, at and for the salary or wages aforesaid, and continue him in such employ for one whole year, to wit, from the day and year aforesaid. And although the plaintiff, confiding in the promise and undertaking of the defendant, did afterwards, to wit, on the said 2d day of *February* 1827, at, &c. enter into the employ of the defendant in the capacity aforesaid, and on the terms aforesaid, and continued in such employ of the defendant in the capacity aforesaid, and on the terms aforesaid, and did furnish reports of such proceedings as aforesaid to the defendant, his servants and agents, for the purpose of publication in the said public newspaper of the defendant, for a long space of time, to wit, until the 4th of *August* 1827, at, &c.; and although the plaintiff was, on, &c. at, &c. and had always been ready and willing, and then and there offered to remain and continue in the employ of the defendant in the capacity aforesaid, and on the terms aforesaid, and to furnish such reports as aforesaid, for the purpose aforesaid, for the remainder of the said year; yet the defendant did not, nor would continue the plaintiff in his the defendant's employ until the expiration of the said year, to wit, from the day and
year

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DUNN
against
MURRAY.

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against
Murray

year aforesaid; but, on the contrary thereof, then and there refused to suffer the plaintiff to continue in his the defendant's said employ, and discharged him, the plaintiff, therefrom, without any reasonable or probable cause whatsoever, and had thence hitherto wholly neglected and refused to retain or continue the plaintiff in his the defendant's employ for the remainder of the said year. By means whereof he, the plaintiff, had lost and been deprived of all the wages, profits, and advantages which he otherwise might and would have derived and acquired from being continued in the employ of the defendant as aforesaid, and which the defendant had from that time, wholly refused to pay or allow to the plaintiff, and the plaintiff had been, by means of the premises, wholly unemployed for the remainder of the said year. There were counts for wages and salary, money had and received, and on an account stated. Plea, non-assumpsit.

This case was referred to *B. H. Malkin, Esq.*, barrister at law, who by his award stated the following facts: "The said *J. Murray*, one *W. J. Stewart*, and one *W. Mudford*, together with certain other persons, on and before the 2d day of February 1827, were the proprietors of a certain public newspaper, and so continued until and after the 2d day of February 1828, and the said *James Dunn* was engaged by the said proprietors as a reporter of the proceedings in the Court of King's Bench, and also of proceedings in the House of Commons, for the said newspaper, for the space of one year, beginning on the said 2d day of February 1827, at the salary of five guineas a week during the whole of the said year; and the said *James Dunn* entered upon his duties as such reporter, and

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DUNN
against
MURRAY.

plaintiff and the said *W. J. Stewart, J. Murray, and W. Mudford*, were referred by order of nisi prius to the arbitrament of *T. N. Talfourd*, Esq., barrister at law; and it was ordered, that the costs of the said suit should abide the event of the award, and that the costs of the reference should be in the discretion of the arbitrator. That order was on *Thursday* next after the morrow of *All Souls*, in the year 1828, made a rule of the Court of K. B. Mr. *Talfourd*, on the 16th of *September* 1828, made his award concerning the matters so referred to him, and thereby awarded that the plaintiff in the said cause had good cause of action in the said cause against the defendants in the same, to the amount of 63*l.*, which he was entitled to recover *as and for his damages in the said cause*; and he also awarded and adjudged, that the defendants in that cause, should pay to the plaintiff in the same the said sum of 63*l.*, in satisfaction of the damages sustained in the said cause, at such time and in such manner as in the award was more particularly mentioned, and that the cause should be prosecuted no further; and that the defendants in that cause should pay their own costs of the reference and of that award, and also should pay the costs of the plaintiff in that cause and of the said reference and award, the same being taxed by the proper officer of the Court. The said *W. J. Stewart, J. Murray, and W. Mudford*, the defendants in the said cause, afterwards, on the 13th of *November* 1828, paid to the plaintiff in the same cause the damages and costs in manner and form as by the said award was directed. The said dismissal of the plaintiff from the service of the said proprietors was proved in evidence before *T. N. Talfourd* upon the said reference, but no claim was made before him for any compensation in damages for
such

such dismissal, except or beyond a claim for the amount of wages or salary accruing up to the 27th day of *October 1827* (being the day on which the said writ in the said action was served), except so far as the counts in the declaration above set forth, and the evidence of the said employment and the said dismissal, might amount to such a claim; and *Mr. Talford*, in assessing the said damages, made no allowance for any such compensation in damages aforesaid, but assessed the same as the amount of wages or salary accruing up to the said 27th day of *October*, and on no other account whatsoever.

Mr. Malkin further found, that the declaration in the present action was filed after the payment of the said damages and costs in the former action, that is to say, on the 18th of *November 1828*; and that the plaintiff had no cause of action in this cause against the said defendant in the same, except upon account of his said dismissal by the said proprietors, and of their failure to employ him as aforesaid until the end of the said year. And upon the foregoing state of facts so found by him for the opinion of the Court as aforesaid, he awarded and adjudged that the plaintiff had good cause of action in this cause against the said *John Murray*, unless the Court should be of opinion that the said proceedings in the said cause, wherein the said *James Dunn* was the plaintiff, and the said *W. J. Stewart*, *J. Murray*, and *W. Mudford* were the defendants, and the said reference and award so made in the same as aforesaid, and the said payment of the said damages and costs so awarded in the same, were a bar to the recovery of the said *James Dunn* in this action. And if the Court should be of opinion that the said proceedings re-

ference

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against
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ference award and payment were no bar to the recovery of the plaintiff in this action, then he awarded that a verdict should be entered for the plaintiff in the same for 52*l*. 10*s*. damages, and 40*s*. costs; and if the Court should be of opinion that the said proceedings reference award and payment were a bar to the recovery of the plaintiff in this action, then he awarded that a verdict should be entered for the said *J. Murray* in the same. A rule nisi had been obtained for entering a verdict for the plaintiff for 52*l*. 10*s*. and 40*s*. costs, pursuant to the award;

F. Pollock and *R. P. Richards*, on a former day in this term shewed cause. The claim in the present action was a matter in difference in the former action, and within the scope of the reference. That award, therefore, precluded the plaintiff from bringing a fresh action, *Smith v. Johnson* (a). In *Lord Bugot v. Williams* (b), which was for money had and received, it appeared that there had been a former action in an inferior court, and that the plaintiff knowing the full extent of his claim, and having a right to recover for it, took judgment for a smaller sum; nevertheless it was held that he could not afterwards say that the recovery was not in respect of his whole demand. So here it must be taken, that the former award was made in respect of the whole of the matters in difference in the action then referred.

Campbell and *Tomlinson* contra. If, in point of fact, there has not been satisfaction for the whole of the plaintiff's demand, he is entitled to recover in this

(a) 15 *East*, 213.

(b) 3 *B. & C.* 255.

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DUNN
against
MURRAY.

wages claimed by the plaintiff upon a contract for his services for a year, beginning the 2d of *February* 1827. It is found that he was dismissed on the 4th of *August* following without any just cause; that he afterwards brought an action against the present defendant and certain other persons, parties to the contract of hiring; and declared for his wages generally, and specially for damages in respect of the dismissal from their service. All matters in difference in that cause were referred; and the arbitrator in the present case has found that the dismissal of the plaintiff was proved on the former reference, but that no claim was then made for any compensation in damages for such dismissal, except or beyond a claim for the amount of wages or salary accruing up to the 27th of *October* 1827 (the day on which the writ in that action was served), except so far as the counts in the declaration; and the evidence of employment and dismissal, may amount to such claim. Now it is clear that the present claim might have been brought before the arbitrator on that occasion; and in the case of *Smith v. Johnson (a)*, Lord *Ellenborough* lays it down, that where all matters in difference are referred, the party, as to every matter included within the scope of such reference, ought to come forward with the whole of his case. So here the present claim was within the scope of the former reference: it was the duty of the plaintiff to bring it before the arbitrator if he meant to insist upon it as a matter in difference, and he cannot now make it the subject-matter of a fresh action. The rule for entering a verdict for the plaintiff must, therefore, be discharged.

Rule discharged.

(a) 15 *East*, 213.

1829.

DOE on the demise of JOHN WINSOR SWEETING,
against S. HELLARD and JANE GRIFFITHS (a).

EJECTMENT for the recovery of certain allotments of land which had been set out under an inclosure act hereinafter mentioned. At the trial before *Bur-*

An ancient tenement was granted by the dean and chapter of *W.* the lords of the

manor of *W.* by copy of court roll to *J. S.*, *T. P. S.*, and *J. W. S.*, habendum for the term of their lives, and the life of every and either of them longest living successively, according to the custom of the manor. *J. S.* died in 1825, *T. P. S.* in January 1826, leaving *J. W. S.* surviving. After the making of the above grant, an act of parliament was passed for inclosing the waste lands within the manor of *W.*, and it was thereby enacted, "that all persons having any right of common over the waste lands therein mentioned should give in to the commissioners therein named an account in writing of their respective claims within the time therein mentioned, and that the determination of the commissioners should be final and conclusive." By another clause it was enacted, "that the commissioners should divide, allot, and inclose the common and waste lands unto, for, and amongst every person or persons, proprietor and proprietors, interested therein in respect of their said old auster or ancient tenements." By another clause it was enacted, "that nothing in the act contained should extend, or be construed to extend, to revoke, make void, alter, or annul any will or settlement, or to prejudice any person having any jointure, dower, portion, or incumbrance out of, upon, or any ways affecting any of the lands, so intended to be divided and inclosed, but that the several messuages, tenements, farms, lands, hereditaments, and premises so to be set out and allotted upon such division and inclosure, should, immediately after such allotment should be made, remain and endure to and for such and the same uses, intents, and purposes as the several messuages, tenements, farms, lands, and hereditaments in respect or in lieu whereof, such allotments should be made as aforesaid, then were, or should or would have been, in case that act had not been made."

The commissioners, by their award, which was made A.D. 1800, allotted unto *T. P. S.* and the dean and chapter of *W.*, according to their respective rights and interests, for and in respect of the ancient auster tenement, certain portions of the waste:

Held, first, that *J. W. S.* was not barred from bringing an ejectment by the statute of limitations, he having had no right of entry until the death of *T. P. S.* in 1826; nor by the clause in the inclosure act, whereby the award of the commissioners was declared to be final, inasmuch as the claim made by *T. P. S.* must be considered as having been made on behalf of all the parties interested in the copyhold tenement.

Held, secondly, that though *T. P. S.* was the only person named in the award, yet the allotment being made to him in respect of the copyhold estate, and in lieu of right of common incident to that estate, the effect of it was, to vest the legal estate in the allotment in the several persons entitled in succession to the copyhold estate, and that the legal estate in that allotment vested, on the death of *T. P. S.*, in *J. W. S.*, and that he therefore might maintain ejectment.

(a) Two or more of the Judges sat as on former occasions, from Thursday the 9th to Saturday the 11th day of July inclusive; and from Monday the 20th to Friday the 24th day of July inclusive; and again from Tuesday the 27th of October to Thursday the 5th of November inclusive. During that period, this and the following cases were argued and determined.

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rough J. at the Summer assizes for the county of *Somerset* 1827, a verdict was found for the lessor of the plaintiff, with certain points reserved, as to which this Court directed the facts to be stated in the following case : —

The manor of *Wantage*, in the county of *Somerset*, is parcel of the possessions of the dean and chapter of the cathedral church of *Wells*, and on the 9th of *April* 1744, and 4th *November* 1746, three copyhold tenements within and parcel of that manor were upon the surrender of *W. Tice* and *Mary Tice*, granted by copies of court roll in reversion to *Malachi Tice*, and his sister *Mary Tice*, for and during the term of their lives successively, according to the custom of the manor, to commence immediately after the death, forfeiture, or surrender, of *W. Tice* and *Mary Tice* his wife; and on the 29th of *October* 1782, the reversion of two of these tenements was granted by copy of court roll by the dean and chapter to *Jonathan Sweeting*, *Thomas Pocock Sweeting*, and *John Winsor Sweeting*, habendum to them for the term of their lives and the life of every and either of them longest living successively, according to the custom of the manor, immediately after the death, surrender, forfeiture, or other sooner determination of the estate then subsisting for the lives of *Malachi Tice* and *Mary Tice* his sister, and *Jonathan Sweeting*, *T. P. Sweeting*, and *J. W. Sweeting*, were admitted tenants as in reversion. *Malachi Tice*, the survivor of the two lives, upon the death of whom the reversion of these tenements was expectant, died in the month of *September* 1819, *Jonathan Sweeting* in *October* 1825, and *Thomas Pocock Sweeting* in *January* 1826, since which period the lessor of the plaintiff, *John Winsor Sweeting*, the person last named in each habendum and admission, has been and now is in possession of the copyhold tenements conveyed

veyed by the copies above set out, and in the receipt of all the rents and profits thereof.

By an act 37 G. 3. intituled, "An act for dividing, allotting, and inclosing certain moors, commons, or waste lands and grounds lying and being within the parishes of *North Curry, Stoke, St. Gregory, and West-hatch*, in the county of *Somerset*;" after reciting the existence of certain uninclosed moors and commons in the parishes above mentioned in the title of the act, and the claims of different lords of manors to the soil of certain of these moors, and the claims of other persons to rights of common thereon in respect of certain old auster or ancient tenements, certain commissioners were appointed for setting out, dividing, allotting, and inclosing the said moors, commons, or waste lands, with certain exceptions; and for preventing all unnecessary delays in the division and inclosure, the commissioners were directed to perambulate and stake out the boundaries, and it was provided, that all and every person or persons having or making any claim or claims which might affect the boundaries or any claim to right of common, right of stocking, or any other right or interest whatsoever, in, upon, or over the said moors, commons, or waste lands and grounds thereby intended to be divided and inclosed as aforesaid, or any part or parts thereof respectively, should, by themselves or their agents respectively, give and deliver to the commissioners or any two of them, at their first or second meeting to be held in pursuance of the act, an account in writing of his, her, or their respective claims; if such claims were objected to at the first, second, or third meeting, the act provided that the objections were in the first instance to be decided by the commissioners, and gave subsequent modes of set-

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ting the disputes if their decision was unsatisfactory; but in case no such claims or objections should be made, or the parties claiming or objecting neglected or refused to adopt such subsequent modes, then the determination of the commissioners was to be final and conclusive to all intents and purposes; certain allotments were then directed to be made to the dean and chapter of *Wells* and other lords of manors, in lieu of their right of soil, and to other persons in respect of other interests, the act stating that the said dean and chapter had agreed not to accept or take any allotment or allotments, in lieu of rights of soil, out of the share which should be allotted by the commissioners to their several and respective tenants, in right of their several and respective tenements held under the said dean and chapter, by lease or copy of court-roll. By another clause it was enacted, that the commissioners should divide, set out, allot, and inclose all the residue and remainder of the said moors, commons, or waste lands and grounds so intended to be divided and inclosed as aforesaid, unto, for, and amongst every person or persons, proprietor and proprietors interested therein in respect of their said old auster or ancient tenements, without any respect to the yearly value of such tenements, it being intended by that act that each proprietor of the said old auster or ancient tenements should have an equal allotment of the said respective moors, commons, or waste lands and grounds, share and share alike; and that it should be lawful for the commissioners or any two of them to set out, allot, inclose, and award to and for each and every proprietor and proprietors, his, her, and their shares and proportions of the said respective moors, commons, or waste lands and grounds in one entire allotment on such of the said moors, commons, or waste lands and grounds,

as



should or would have been in case this act had not been made." And the act concluded with the following general saving clause: "Saving always to the king's most excellent majesty, his heirs and successors, and to all and every other person and persons, bodies politic and corporate, his, her, or their heirs, successors, and administrators, other than and except the several persons to whom any allotment or allotments shall be made, and whose rights are hereby intended to be barred and extinguished, all such estates, right, title, interest, claim, and demand which they, any, or every of them had or enjoyed of, in, to, or out or in respect of the said moors, commons, or waste lands and grounds so intended to be divided and inclosed as aforesaid, at the time of passing this act, or could or might have held and enjoyed in case the same had not been made."

The commissioners made their award the 21st of *June* 1800, and thereby allotted unto *Thomas Pocock Sweeting*, and the said dean and chapter, according to their respective rights and interests, for and in respect of a certain old auster or ancient tenement called *Elms*, situate and being in the said parish of *North Curry*, one piece or parcel of ground, therein particularly described, as containing by admeasurement 2R. 2P., and numbered 7 on the said plan; and one other parcel of ground, therein also particularly described, and numbered 416 on the said plan. And also unto the said *Thomas Pocock Sweeting* and the dean and chapter, according to their respective rights and interests, for and in respect of a certain old auster or ancient tenement also called *Elms's*, situate and being in the said parish of *North Curry*, one piece or parcel of ground, numbered 418 on the said plan. And also unto the said *Thomas Pocock Sweeting*, and the said dean and chapter, according to their respective rights



holden, the lessor of the plaintiff is at all events entitled to the present possession of them; for the claim having been made by *Thomas Pocock Sweeting*, and the allotments awarded to him in respect of tenements of which he was a tenant in succession, the interest which he took was commensurate only with the interest which he had in the tenements, and passed with that upon his death to the next life in succession in the copy. The claim made by *Thomas Pocock Sweeting* must be considered to have been made by him on behalf of all the parties interested in the copyhold estate. The award of the commissioners, which derives its whole force from the act of parliament, constitutes rather evidence of than the title to the allotments, *Kingsley v. Young (a)*. The land is allotted to the party claiming it, not as a mere individual, but in respect of the copyhold estate; it is made to him in respect of the whole copyhold estate, and not in respect of any particular interest in the copyhold. Besides, it is expressly enacted, that nothing in the act contained shall revoke or annul any will or settlement. Now the limitations entered on the court rolls may, in furtherance of the intention of the legislature, be considered to be a settlement. And if that be so, then the land allotted must remain and enure to the same uses, intents, and purposes as the copyhold estates in respect of which the allotments were made. Secondly, the lessor of the plaintiff is not barred by the statute of limitations, for he had no right of entry until the death of *Thomas Pocock Sweeting*, nor is he barred on the ground that he made no claim within the time required by the inclosure act, because the claim made by *Thomas Pocock Sweeting* must be

(a) 18 Ves. 206.



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an attorney to make a claim for them, and he claimed in his own name, and the commissioners awarded to him, would he take the legal estate in fee?] He would take the legal estate as trustee for the party beneficially interested. Secondly, *Thomas Pocock Sweeting* having at the date of the award no present possessory interest in the tenement in respect of which the allotments were made, and having been in possession ever since of three out of four of the allotments made to him, it is to be now presumed, unless the contrary be shewn, that he made out a satisfactory title, either legal or equitable, and that his claim must have been made upon some agreement between him and the parties interested, no objection appearing to have been made by any one, and the inclosure act declaring the determination of the commissioners to be final. *Doe on the demise of Watson v. Jefferson* (a) is in point. There, in 1813, the commissioners for the inclosure of a parish, the tithes of which were vested in several lay impropiators, appointed meetings for receiving claims, and various claims were put in, but none in respect of tithes, within the time limited by the general inclosure act; notwithstanding this, the commissioners, in 1817, made *Jefferson* an allotment in respect of the impropriate tithes of certain land occupied by him, which tithes, as well as the land, *Jefferson* claimed under the will of *George Peat*; in 1820, *Watson*, who claimed these tithes under the heir of *Peat*, on the ground that they did not pass by *Peat's* will, brought an ejectment for the allotment made in respect of them: and it was held, that, having omitted to make his claim before the commissioners within the

(a) 2 Bing. 118.

time limited by the act, he could not recover. That case was decided upon the sixth section of the general inclosure act, 41 G. 3. c. 109. The words of the inclosure act, in pursuance of which the allotments were made in this case, do not materially differ from those used in the general inclosure act.

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Coleridge in reply. The legal estate in the allotments is not in the dean and chapter, for by the act of parliament they agreed not to accept or take any allotment, in lieu of rights of soil, out of the share which should be allotted to their tenants in right of their tenements, held by lease or copy of court roll. The plaintiff could not, therefore, have recovered on a demise by the dean and chapter. The legal estate is not in the heir of *Thomas Pocock Sweeting*; he must claim under the award, or not at all, and by the award the land is allotted to him in respect of his interest in the copyhold tenements. That interest was for the term of his life, and is now at an end.

BAYLEY J. I have no doubt on the authorities, that the allotments are freehold and not copyhold estate. But I think that the nominee in the award did not take any estate of freehold, or any estate whatever in the land allotted. The commissioners, by the act of parliament, have no authority to grant estates, but a mere power to allot land to persons having copyhold estates. They are to divide, set out, allot, and inclose the moors, commons, or waste lands, unto, for, and amongst all persons or proprietors interested therein in respect of their said old auster or ancient tenements. They have, therefore, power only to allot to a person having an estate or interest in an ancient tenement.

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tenement. They had no power, therefore, to allot to *Thomas Pocock Sweeting*, except as a person having an interest in an estate called an auster tenement. The right of common is to be extinguished, and the commoners in lieu thereof are to have allotments. Each claim, therefore, must be made in respect of a particular auster tenement. If no claim be made in respect of an auster tenement, the owner of that tenement may lose his rights. But if a claim be made, the allotment ought to be co-extensive with the right appurtenant to the tenement, and ought not to be made with relation to the particular interest of the claimant therein as tenant for life or in reversion. The allotment should be in respect of the whole right. *T. P. Sweeting* was the only person who made any claim in respect of the auster tenement in question, and an allotment was made to him in respect of that tenement. Now he could not claim but in respect of the whole right appertaining to the auster tenement. He could not, at all events, by making a claim in respect of his particular interest only, acquire any interest in the allotment before his interest in the copyhold tenement accrued. The commissioners had no power to allot to any one except in respect of an estate in possession. I will presume that *Thomas Pocock Sweeting* acted honestly, and made a claim in his own name only, but for the benefit of all persons having any interest. That is the only way in which he could honestly make a claim. I take it, therefore, he did claim on behalf of all persons successively entitled to the copyhold estates, and among others of the lessor of the plaintiff. The latter, therefore, is not barred by the clause in the inclosure act, which requires claims to be made within a limited time. And although the allotment is awarded by the commissioners to the claimant by name, I think that,

that, according to the fair construction which directs that every proprietor shall have an allotment in lieu of the legal estate in the land allotted (nominee as trustee) but in the session, and at the same time as the copyhold vests, and as the right of common would have vested if the act had passed. The proviso applies to other cases. By that clause it is provided that it shall not extend to revoke, alter, or annul any settlement affecting any of the lands so divided and allotted, but that the lands so allotted shall, immediately after such allotment, remain, and enure to and for such uses and intents, and purposes as the several acts in that behalf made, or in lieu whereof such allotments were made, aforesaid, were, are, or should be made, in case that act had not been made. And as the copyhold tenement had by settlement been given to several persons in succession, in the same manner as it is in the court rolls, the allotment shall be to the same uses and in the same manner as the copyhold tenement. Giving a liberal construction to that clause, in furtherance of the intention of the legislature, I think that it may be considered to have been intended to be within the meaning of that word. Whatever particular interests there may be in the copyhold estate at the time of the act made, are, by force of the proviso, made void by the allotment. That being so, the legal estate allotted vests, on the death of *The* *King*, in the lessor of the plaintiff, and

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the action was brought was in him; and he need not incur the expense of going into a court of equity. The judgment of the Court must, therefore, be for the plaintiff.

LITLEDALE J. I have no doubt that the allotment is freehold. The only question is, whether the lessor of the plaintiff has the legal estate in the allotment. By the act of parliament the commissioners are authorised to "divide, set out, allot, and inclose all the moors, commons, or waste lands and grounds into, for, and amongst every person or persons, proprietor or proprietors, interested therein in respect of their said old auster or ancient tenements." The manifest intention of the legislature was, that every proprietor of an auster tenement, whether interested in possession or reversion, should have an allotment in respect of such tenement. The nature of the interest is immaterial. The legislature certainly intended that persons standing in the situation of the lessor of the plaintiff should have allotments. It is not necessary that all the parties interested in a particular copyhold estate should claim. If a claim be made by any of those parties, it must be considered as virtually made for the benefit of all the parties interested in that estate. The claim, therefore, was made by *T. P. Sweeting* for the benefit of the lessor of the plaintiff, and he is not barred of his right of action by the clause in the inclosure act, whereby the award is declared to be final. But, then, it is said that the legal estate is not in him. It becomes material to consider what the commissioners have done by their award. They have only allotted to *T. P. Sweeting* on certain terms. They have, in point of form, awarded to *T. P. Sweeting* and the dean and chapter according to their

their respective rights and interests; or, in other words, that he *Sweeting* should have an allotment according to his then expectant life interest. The commissioners by their award have not in express terms given any interest to others. We must see, however, if the words of the award can be extended by any clause of the act so as to include other parties having an interest in the copyhold estate. If the act of parliament had never passed, the copyhold tenement, and the right of common incident to it, would, after the death of *Jonathan Sweeting*, according to the terms of the grant, have vested in succession in *Thomas Pocock Sweeting* and *John Winsor Sweeting*, the lessor of the plaintiff. Now it is expressly provided by the inclosure act that it shall not be construed to revoke, make void, alter, or annul any will or settlement, but that the lands to be allotted shall, immediately after such allotments shall be made, remain and enure to and for the same uses, intents, and purposes as the several tenements and lands in respect or in lieu whereof such allotments shall be made, then were, are, or should or would have been in case the act had not passed. If the first part of this clause were wholly struck out, I should have had no doubt that the words in the latter part of the clause would have been sufficient to extend to this case. My doubt is, whether the grant by the lord for the three lives in succession on the court roll can be considered to come within the words "a will or settlement." The words in the latter part of the clause are certainly more general than those in the beginning. My doubt is, whether the word *settlement* can apply to the limitation of an estate by copy of court roll. The word, as used in the beginning of the clause, seems to import a settlement strictly so called. The latter part of the clause, beginning with the words "but that,"

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that," seems to have been introduced to explain what went before. Considering, however, that the manifest meaning of the act of parliament is that all persons interested in the copyhold tenement shall have the benefit of the allotment, I think that the act should be construed so as to give effect to that intention, and to extend the benefit of the allotment to all persons interested in the copyhold estate. So construing it, we must consider the limitations introduced in the court rolls to be a settlement of the copyhold estate, and then it is not annulled or revoked by the act of parliament. I am therefore of opinion, that the legal estate in the allotment, on the death of *Thomas Pocock Sweeting*, vested in the lessor of the plaintiff.

PARKE J. I am of opinion that the plaintiff is not barred by the statute of limitations nor by the clause in the inclosure act. It is clear that he is not barred by the statute of limitations, because he had no right of entry until the death of *T. P. Sweeting*. Then it is said that he is barred by the clause in the inclosure act whereby the commissioners have power to hear and determine upon all claims, and their award is declared to be final and conclusive. That clause refers to a claim made by one copyhold tenant against another, as well as by one set of copyhold tenants against others. One claim is to be made in respect of an auster tenement, and therefore in respect of the whole copyhold interest in that tenement. Looking at the whole allotment as made in respect of one estate, it seems to me that the effect of the award is to vest the new estate in the allotment in lieu of the old interest, and in the persons entitled to that interest in succession. The commissioners are required



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interested in the copyhold tenement. It is said the commissioners had power to grant the fee. But they had no estate whatever; they had power only to put the parties interested in an auster tenement into the new estate, subject to and in the place of the old interests. If a contrary construction were to prevail, the legal estate would not be in any person. It could not be in *Thomas Pocock Sweeting*, for his interest has ceased; nor in the dean and chapter, for they are reversioners. To avoid that inconvenience, we must hold that the legal estate is in the same person as the copyhold tenement. In *Doe v. Jefferson* the party claiming was a stranger to the estate.

Judgment for the plaintiff.

See Cook v. Clarke 10 Bing. 19.
--- *Case v. Chapman 10 Ad. 221 1792*
--- *Ridd v. Sill 12. 2. 200 1791, 601,*
--- *Angus v. Auckland 10 M. & W. 346*
--- *Hayden v. Hayden 10 M. & W. 347.*

BEECHEY against SIDES.

By the act 7 & 8 G. 4. c. 30. for consolidating the laws relating to malicious injuries to property, section 41. it is enacted, that in all actions to be commenced against any person for any thing done in pursuance of the act, notice in writing of such action, and the cause thereof, shall

TRESPASS and false imprisonment. Plea, not guilty. At the trial before *Parke J.*, at the Spring assizes for the county of *Oxford* 1829, the following appeared to be the facts of the case:— One *Weller*, on the 21st of *December* 1824, became tenant to the defendant of a farm and two closes of meadow land, situate in the parish of *St. Giles*, in the suburbs of the city of *Oxford*. That tenancy continued until the 21st *December* 1828, when it was dissolved, in pursuance of a previous agreement between *Weller* and the defendant. In one of the meadows there were some willow trees.

given to the defendant one calendar month before the commencement of the action: and, in an action brought by *A.*, who, for a supposed malicious injury to property, had taken into custody by *B.*, who bonâ fide believed that he was acting in execution of act, that *B.* was entitled to notice of action.

Weller,

Weller, in pursuance as he alleged, of a custom of the county, claimed the right of lopping the trees, and on the 2d of *December*, the lop being then of sufficient growth, sold it to one *Harris*, who employed the plaintiff to lop the trees for him, and he, early on the morning of the 3d of *December*, began to lop them. The defendant gave the plaintiff notice not to do so. The latter, after shewing the notice to *Weller*, by his direction continued to lop the trees. The defendant then considering that the plaintiff was a person committing an offence against the statute 7 & 8 G. 4. c. 80. entitled, an act for consolidating and amending the laws relating to malicious injuries to property, came with a constable, who by the direction of the defendant took the plaintiff into custody. He was taken to the town clerk's office in *Oxford*, where he was liberated on his own undertaking to appear the next morning before a magistrate; he did appear, and was then discharged. It was objected on the part of the defendant, that he ought to have had, one month before action brought, notice in writing of the cause of action, pursuant to the forty-first section of the act (a), the action being brought against him *for a thing done in pursuance of the act*. The learned Judge inclined to that opinion, and said he would not stop the cause, but would reserve liberty to the defendant to move to enter a nonsuit, if there should be a verdict for the plaintiff.

(a) By s. 20., any person destroying or damaging trees, shrubs, &c. wheresoever growing, and of any value above one shilling, is punishable on summary conviction; and by s. 24., any person committing damage to any property, in any case not previously provided for, may, on conviction before a justice, be compelled to pay a compensation not exceeding five pounds. By s. 28., any person found committing any offence against the act, may be apprehended by any peace officer, or by the owner of the property injured, without a warrant.

posing he is warranted by the act of parliament in doing that which is made the subject of an action, he is entitled to notice. The protection is not confined to peace-officers.

LITLEDALE J. concurred.

Rule discharged.

The KING *against* The Inhabitants of LOWER MITTON.

Where a canal company were authorised to receive a mileage toll for goods conveyed on the canal, and in lieu of the mileage duty, distinct tolls on all vessels passing through two locks; it was held, that the whole annual profits of the locks were, for the purpose of being rated to the relief of the poor, to be considered as having been produced in that parish where the locks were situate, and not in the several parishes through which the canal passed in proportion to the length of the canal in each parish.

UPON an appeal against a rate made in *February* 1826, for the relief of the poor of the hamlet of *Lower Mitton*, in the parish of *Kidderminster*, in the county of *Worcester*, whereby the *Staffordshire and Worcestershire* Canal Company were rated for their basins, towing paths, and that part of their canal, and the locks thereon, lying within *Lower Mitton*, and for the tolls and duties arising therefrom due at *Lower Mitton* on 4000*l.* at the sum of 200*l.*, the sessions amended the rate by reducing the sum for which the company were rated from 4000*l.* to 706*l.* 9*s.* 6*d.*, subject, as to lock duties hereinafter described, to the opinion of this Court on the following case: —

By an act of the 6 G. 3. the company are empowered to take rates and duties for tonnage and wharfage for all

The annual profit is the rent which a tenant would give, he paying the poor rates and the expenses of repairs and the other annual expenses necessary for making the subject of occupation productive, and allowing him a deduction from the rent where the subject is of a perishable nature, towards the expense of renewing or reproducing it.

goods

goods conveyed on the canal, not exceeding three halfpence per mile for every ton, and so in proportion for any greater or less quantity than a ton. By another act of the 10 G. 3. the company are authorised to take tonnage proportionably for any less distance than a mile which any commodities shall be conveyed on the canal, *and the boats, barges, and other vessels passing through the two locks* erected between the river *Severn* and the canal basin are to pay a toll or lock due of one penny per ton in lieu of the tonnage of three halfpence per mile fixed by the said recited act of the 6 G. 3.

The canal basin is twelve feet below the level of the canal, and twenty-four feet above that of the *Severn*, with which it communicates through the locks mentioned in the enactment. These two locks receive the necessary supply of water from the basin, which is itself supplied partly from the canal and partly from the *Severn*. The supply from the *Severn* is raised by means of a steam engine, which is used for no other purpose than to raise this supply. The lock dues received by the company for boats, barges, and other vessels passing through the said two locks from *November* 1825 to *November* 1826 amounted to 350*l*. The said two locks, basin, and steam engine are locally situated in the hamlet of *Lower Milton*. The boats, barges, and other vessels which pass through these locks, for the most part bring into the basin cargoes to be taken up the canal, and which in fact are subsequently so taken, or take out of the basin cargoes which have been brought down the canal, and the toll of 1*d*. per ton is due and paid for merely passing through the two locks from the canal basin to the *Severn*, and vice versâ. The barges that pass from the *Severn* into the canal basin cannot navigate

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the canal, and the boats that come down the canal rarely pass into the *Severn*, but tranship their cargoes in the basin into the *Severn* barges, and the toll for passing the two locks is in both cases paid for the barges and boats. If a canal boat passes into the *Severn* from the basin, it pays the lock dues in addition to the mileage dues paid for carrying goods along the canal. The lock dues paid as above stated are the only profits which the canal company derive from the *Severn* locks. The court of quarter sessions were of opinion that the profits of the locks were not rateable in *Lower Mitton* only, but that they should be divided amongst all the parishes through which the canal runs, in proportion to the length of canal in each parish, in the same manner as the general profits of the canal are divided. If this Court should be of opinion that the sessions were wrong, the rate was to be amended by increasing the amount at which the company were rated from 706*l.* 9*s.* 6*d.* to 1056*l.* 9*s.* 6*d.* On a former day during these sittings, the case was argued by

M^cMahon, *Whateley*, and *Holroyd* in support of the order of sessions. If the 1½*d.* per ton per mile is, for the purpose of rating, rightly divided among all the parishes, it must follow that the 1*d.* per ton should be also divided in the same manner. First, the 1½*d.* per ton is rightly divided among all the parishes. It is fully settled by recent decisions, that the tolls of a canal are rateable as the profits of land, *Rex v. Milton* (a). The profits of land are rateable in that parish, in which the land producing them lies. If an entire profit be produced by land lying

(a) 3 B. & A. 112.

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in several parishes, the profit must be divided among the several parishes in the proportion in which the land in each parish contributes to the entire profit. In a canal, the water of which is constantly, or at intervals only, passing from one part to the other, the whole of the land, over which the water passes, contributes to the navigation in each part. The whole of the land in different parishes is therefore employed simultaneously in effecting the navigation in the one parish; and the price which is paid for that navigation is a price earned by the joint use of all that land, and constitutes the profit of *all* the land which so earned it; and, consequently, that entire profit must be divided *equally* among all the parts of the canal; in other words, among all the parishes through which the canal passes, in proportion to the quantity of land lying in each. If it were to be laid down as a rule, that the tolls of a navigation must be deemed the profits not of all the land which is used in effecting the navigation, but of that portion only over which the navigation happens to be in fact made, this consequence might ensue, that the land over which no navigation took place would have no profit at all assigned to it. Suppose a canal to be commenced in parish *A.*, not in the expectation of any traffic in that parish, but for the sole purpose of obtaining the needful supply of water; that no boat ever navigated on that part of the canal, but that large traffic is carried on along the rest of the canal, and great profits realized by means of the water which the land in parish *A.* supplies, and without which the navigation could not exist; it could not be said that the land in parish *A.* produced no profit, but it could be rated only in respect of the profits which it contributes to earn in other parishes. *Rex v.*

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The New River Company (a) shews they may be taken into account. In that case it was found that certain land (rated at 300*l.*) was, if not covered with water, of the annual value of 5*l.*; but if the advantage which the company derived (in other parishes) from the use of the water, might by law be included in the rate upon the land, on which the water arose, the land and spring together were of the annual value at which they were rated. And the Court held, that that advantage might by law be included in that rate. That case is precisely similar to the present in principle. There the water was conveyed to the other parishes in pipes under ground, here in trenches above ground; there it was sold to housekeepers for domestic purposes, here it is sold to bargemen for the navigation of their barges. *Rex v. Mayor of Bath* (b), and *Rex v. The Rochdale Water Works* (c), *Rex v. Palmer* (d), fully establish the principle contended for.

Secondly, this being so with respect to the mileage duty for the conveyance of goods along the whole line of the canal, the same rule must obtain with respect to the lock dues for the conveyance of goods through the locks. First, the 1*d.* lock duty is given expressly *in lieu* of the mileage duty. If that is to be called a general profit, and as such divisible among all the parishes, the lock duty, which is substituted for it in a particular part of the canal (for the locks are a part of the canal), must possess the same character. There are other locks upon this canal, the toll of which is not distinguished from the general line of the canal. It is clear

(a) 1 *M. & S.* 503.

(c) 1 *M. & S.* 634.

(b) 14 *East*, 609.

(d) 1 *B. & C.* 546.

that



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water, would be to be rated in all the parishes through which the rest of the canal passes. [Parke J. A part of the water which supplies these locks is derived from the *Severn* by means of a steam-engine, which is locally situate in *Lower Mitton*; why are the other parishes to partake of the profit derived from this part of the water, which they must do if the lock dues are to be divided equally among all the parishes?] That objection applies equally to the division of the mileage duty; for the effect of that division is that *Lower Mitton* partakes of the profits made in all the other parishes; and therefore, upon the principle of reciprocity alone, the other parishes ought to partake of the profits in *Lower Mitton*. But all the other parishes do in fact contribute to earn the profit which that part of the water which is derived from the *Severn* may be supposed to produce. For that water by itself would be insufficient to pass a single boat, or consequently to earn any profit. It is rendered productive only by means of the addition which the rest of the canal supplies. Those cases where the profits of a lock, having arisen exclusively from land lying within the parish, have been held to be wholly rateable in that parish, are distinguishable from this, because the profits here arise in part from land lying in other parishes. In *Rex v. Kingswinford (a)*, there was no pretence for saying that one of the three canals contributed to produce the toll which had been given to the others.

Shutt, contra. It is a well established rule, that a rate may be imposed on any local visible property lying within the parish in which the rate is made, and pro-

(a) 7 B. & C. 236.

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Rex v. Palmer (a),) that the proprietors of a canal or navigation are rateable as occupiers of the land covered with water in the particular parish in which the land lies; and it follows from thence, and it was so decided in *Rex v. Kingswinford* (b), that they are rateable in each parish, in proportion to the profit which that part of the land covered with water which lies in the parish produces. If it is more productive than other parts of the canal, either because there is more traffic, or because larger tolls are due upon it, or because the outgoings and expenses there are less, it must be assessed at a higher proportionate value. It is, however, contended, that there is a distinction between the case of a canal or navigation, and a lock; and that the lock is profitable, because it is supplied with water from the rest of the canal lying in other parishes. This argument, supposing it to be well founded, only proves that a *part* of the source of profit is derived from the other parishes in which the canal lies, and that, consequently, a part only of the lockage dues ought to be ascribed to those parishes; for the dues are payable as well for the use of water derived from the *Severn*, as from the canal, and also for the use of the soil and fixed machinery of the locks; and, therefore, the rule adopted by the sessions, even according to the argument used by the respondents, was wrong. We are, however, of opinion, that there is no distinction as to the principle of its rateability between a lock and a portion of a canal or river navigation; and that, whether the subject-matter of the occupation be productive of itself, or rendered productive by something brought from another parish, or by being used in con-

(a) 1 B. & C. 546.

(b) 7 B. & C. 256.

junction with property in another parish, no difference is to be made in the mode of rating. Thus, whether the water in a canal be brought from the same parish, or another parish, whether conveyed in pipes, or carts, or by engines, makes no difference, if the land in which it is placed be thereby rendered more valuable. It makes no difference whether it remains comparatively still as in a canal, or moves constantly as in a river, or occasionally as in a lock; nor does it make any difference that, unless there was a canal in another parish connected with the lock, no profit would be gained. It might as well be contended that the profits of a bridge, which would not arise unless there were roads to it, or of land rendered more valuable by roads in an adjoining parish, should be rated in part only in the parish in which such bridge or land is situate.

The order of sessions must therefore be quashed; and the sessions must rate the company according to the annual profit or value which the subject of occupation within the parish produces. This, in general, would be properly estimated at the rent which a tenant would give, he paying the poor rates and the expenses of repairs, and the other annual expenses necessary for making the subject of occupation productive; and a further deduction should be allowed from that rent, where the subject is of a perishable nature, towards the expense of renewing or reproducing it. This is the rule laid down in *Rex v. The Duke of Bridgwater's Trustees* (a), and *Rex v. Tomlinson* (b).

It must therefore be referred back to the sessions, to adjust the rate upon this principle.

(a) 9 B. & C. 68.

(b) 9 B. & C. 162.

The KING *against* The Undertakers of the AIRE and CALDER Navigation.

An act of parliament of the 9 & 10 W. 3. gave to certain undertakers authority to make navigable the river *Aire*, and for that purpose to cleanse and scour the same, and dig and cut the banks. By a subsequent act, reciting that the legal estate and interest in the navigation of the said river and divers messuages, mills, warehouses, buildings, lands, tenements, and hereditaments, was vested in trustees, they were authorised by deed to sell and convey in fee such messuages, mills, lands, or tenements belonging to the undertakers, or to convey in fee, by way of mortgage, as well the said navigation, as also all or any messuages, mills, lands, tenements, and hereditaments, being the property of the undertakers: Held, that the word "navigation" in that act imported an incorporeal hereditament; and that it authorised the trustees to mortgage in fee that incorporeal hereditament; and the first act having given the undertakers an incorporeal hereditament only in the bed of the river, they were not rateable to the poor as occupiers or owners of the river *Aire*.

UPON an appeal against a rate for the relief of the poor of the township of *Brotherton*, in the West Riding of the county of *York*, whereby the defendants were assessed in the sum of 150*l.*, on a total annual value 2000*l.*, as occupiers and owners of the cut or canal, and that part of the river *Aire* lying within the township of *Brotherton*, dams, locks, and weirs, and toll dues or rates, the sessions confirmed the rate, subject to the opinion of this Court on the following case: —

By an act passed in the 10 & 11 W. 3., for making and keeping navigable the rivers of *Aire* and *Calder*, in the county of *York*, certain persons therein named were empowered, at their own proper costs, to make navigable and passable with barges, boats, lighters, and other vessels, the said rivers *Aire* and *Calder*, from *Weeland* up to the towns of *Leeds* and *Wakefield*, and for that purpose to cleanse, scour, open, enlarge, or straighten the said rivers, or either of them, and to dig or cut the banks of the same, and to make new or larger cuts, trenches, passages for water, in, upon, or through the lands or grounds adjoining or lying contiguous to the said rivers, or either of them, as they should think fit or necessary for the better carrying on and effecting

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the said undertaking; and to build, erect, set up, and make, upon the lands adjoining to the said rivers, or either of them, locks, weirs, turnpikes, pens for water cranes, wharfs, and warehouses, where the said undertakers, their heirs or assigns, should think fit. And it was enacted, that for and in consideration of the great expenses which the undertakers, their heirs or assigns, would be at, not only in making the said rivers navigable as aforesaid, but also in repairing and keeping the said rivers navigable and useful for the said navigation, it should be lawful for the said undertakers, their heirs, executors, administrators, and assigns, and no others, from time to time, and at all times thereafter, to demand and take from all persons that should send down or receive up any packs or trusses of cloth, or other merchandizes, wares, or commodities whatsoever that should be conveyed up or down the said rivers, or either of them, the rates and tolls thereafter mentioned; saving and always reserving unto the corporation of *Pontefract*, in the county of *York*, and to all other person and persons, their respective heirs, successors, and assigns, all royalties and rights, and privileges of fishing, and other dues and duties, in or upon the said rivers, or either of them.

By an act of the 14 G. 3., entitled "An Act to amend an Act passed in the 10 & 11 W. 3.," it was enacted, that it should be lawful for the said undertakers, at all times, at their discretion to cleanse, scour, deepen, enlarge, straighten, contract, and improve, and in a good navigable state to keep and preserve, by all necessary and proper works, ways, and means, as well the said several cuts and canals, and every of them, as also the cuts made under the authority of the said act of W. 3., and

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the channels and courses of the said rivers *Aire* and *Calder*, and the beds thereof respectively, not only from the said towns of *Leeds* and *Wakefield* to the place called *Weeland*, but also from *Weeland* to the conflux or conjunction of the said river *Aire* with the river *Ouse*; and to remove all beds of earth, soil, sand, gravel, and stone, and all other obstructions and impediments whatsoever, which any wise obstructed the said navigation, either in haling, sailing, or towing of boats, barges, &c. with men, horses, or otherwise; and also to build and set up, or make over, across, or in the said cuts, canal, and channels or courses of the said rivers *Aire* and *Calder* aforesaid, and upon the lands and grounds adjoining or near unto the same, such and so many bridges, tunnels, culverts, locks, sluices, floodgates and other gates, pens for water, weirs, jetties, weigh-beams, winches, cranes, engines, and other works, as should be thought necessary or convenient for the said navigation.

And by s. 110. of the said act, after reciting that the legal estate and interest in the then present navigation of the said rivers, with the works and appurtenances of navigation thereunto belonging, and the tolls and duties by the said former act granted, and divers messuages, mills, warehouses, buildings, lands, tenements, and hereditaments, vested in Sir *W. Milner*, *Jeremiah Dixon*, *Richard Wilson*, and *Richard Burton*, and their heirs, — that is to say, one full moiety or half part of all the premises to the use and behoof of the said Sir *W. Milner* and *Jeremiah Dixon*, their heirs and assigns for ever; and the other full moiety or half part of all the premises to the use and behoof of the said *Richard Wilson* and *Richard Burton*, their heirs and assigns for ever, — nevertheless upon trust for themselves
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several proposed cuts, canal, and other works for the improvement of the navigation, would be attended with considerable expense, and it might become necessary for the said undertakers to raise money, as well for defraying such debts and expenses as for making future purchases and improvements in their said navigation; it was enacted, that it should be lawful to and for the trustees in whom the legal estate and interest of the said navigation and premises should be then vested, and they the said trustees, and their heirs, were thereby empowered and directed, by any deed or deeds to be by them executed in the presence of two or more credible witnesses, as well to sell and convey in fee simple such messuages, mills, lands, or tenements belonging to the said undertakers, their heirs and assigns, as should be directed to be sold and conveyed as aforesaid, or to grant, demise, convey, and assure in fee, or for any term or number of years by way of mortgage, as well the said navigation and the tolls, rates, and duties of the same, as also all or any messuages, mills, lands, tenements, and hereditaments, being the undivided property or estate of, or which should thereafter belong to, the undertakers, their heirs or assigns, or any part or parts thereof, as a security for the repayment of all sums of money to be raised or borrowed, unto such person and persons respectively, or his, her, or their trustee or trustees, as should be willing to advance and lend the same. In pursuance of the powers contained in the said acts of parliament, the undertakers of the navigation of the rivers *Aire* and *Calder* have made the said rivers, and still maintain the same navigable and passable in the manner directed by the acts. The river *Aire* passes through the respondents' township. The river

river navigation in that township is of the length of 5428 yards. In one part of the river in that township there is a weir across the river, and a side cut with locks for the purpose of passing boats and barges from the higher level above to the lower level below the weir. The side cut is of the length of 186 yards, and had been made by the undertakers of the navigation in pursuance of the powers given them for that purpose by the act of W. 3. The undertakers of the navigation of the *Aire* and *Calder* had never before been rated to the poor in the township of *Brotherton*, in respect of the navigation, or of their dams, locks, weirs, or the tolls arising therefrom; but have been for many years, and antecedently to the passing of the last-mentioned act of the 14 G. 3., rated in respect of the tolls of their navigation in the township of *Leeds* and *Wakefeld*. The tolls due in respect of goods carried along the navigable channel in the township of *Brotherton* amount to the sum at which the appellants are rated, but the proportion due in respect of the passage along that portion of the navigable channel which consists of an artificial cut falls far short of that sum. No tolls are received in the township of *Brotherton*. The appellants contended that they were not, under the circumstances, liable to be rated for the relief of the poor in the township of *Brotherton*, in respect of the cut or canal, or that part of the river *Aire* lying in *Brotherton*, or the dams, locks, and weirs, tolls, dues, or rates, or any of them: or, at any rate, that they were not rateable in respect of the part of the river *Aire* lying in *Brotherton*, or the tolls, dues, or rates; and that the rate was bad, as including conjointly various matters, some of which were clearly not rateable, and for not stating explicitly how much

was laid on each subject-matter of assessment. The sessions, however, were of opinion that the appellants were, under the circumstances stated, liable to be rated in respect of the whole of the navigable channel; and confirmed the rate generally, subject to the opinion of this Court on the whole case.

J. Williams and *Archbold* in support of the order of sessions. It must be conceded, that if the acts of parliament do not vest the soil of the bed of the river in the undertakers of the *Aire* and *Calder* navigation, but give them an easement only, they are not occupiers of land, and, consequently, are not rateable to the relief of the poor, *Rex v. The Mersey and Irwell Navigation* (a), and *Rex v. Thomas* (b). The statute 9 & 10 W. 3. undoubtedly does not vest in the undertakers the soil of the bed of the river; but they have the same powers of entering for the purpose of making and maintaining the navigation, as were given to the *Irwell* and *Mersey* navigation. The 14 G. 3., however, shews that the soil is vested in the undertakers. The 110th section recites, that the legal estate and interest in the (then) present navigation of the said river, with the works and appurtenances of *navigation*, and the tolls and duties by the former act granted, and in the messuages, mills, buildings, lands, tenements, and hereditaments, vested in certain persons therein named, their heirs and assigns, as trustees for the undertakers. The word *navigation* imports the bed of the river, not a mere right of using the river for the purpose of passing over. [*Parke J.* Assuming that the recital imports that the fee simple of

(a) Ante, p. 95.

(b) Ante, p. 114.

the bed of the river had vested in them, what act of parliament gave it them? Not the statute 9 & 10 W. 3. Then how did they get the fee simple? It is not suggested that they took it by any conveyance from the former owners.] By another clause, the trustees in whom the legal estate and interest in the said navigation and premises was then vested, were authorised to sell and convey in fee simple the messuages and lands, &c. belonging to the undertakers; or to convey in fee, or for any number of years, by way of mortgage, as well the said *navigation*, as the tolls, as a security for the repayment of money borrowed. The trustees, therefore, may sell the land purchased by the company, and the buildings belonging to them. But they may only mortgage in fee the navigation and tolls arising therefrom. This clearly imports that the trustees had the fee in the navigation or bed of the river.

Coltman, contra, was stopped by the Court.

BAYLEY J. I think that the undertakers of the *Aire* and *Calder* navigation are not liable to be rated for the bed of the river. In order to make them rateable, they must be within the words of the forty-third of *Elizabeth*, "occupiers of lands or houses." *Rex v. Irwell and Mersey Navigation*, and *Rex v. Thomas*, have established as a rule, that where an act of parliament, passed for the purpose of making navigable a natural river, does not vest in the undertakers of the navigation the bed of the river, but gives them for that purpose a mere privilege of scouring and cleansing it, they are not occupiers of the land used for the purpose of navigation, but have a mere easement in it. Now, the language of the

9 & 10 W. 3. so nearly resembles that used in the act of parliament in *Rex v. Irwell and Mersey Navigation Company*, that, if the case depended on that alone, it is conceded it would not be distinguishable from that case; and that if that case was rightly decided, the undertakers of the *Air and Calder Navigation* are not occupiers of land. But then it is said, that the language used in the 14 G. 3. shews that the company are owners and occupiers of the bed of the river. The statute 9 & 10 W. 3. having given to the undertakers an incorporeal hereditament, the 110th section of the 14 G. 3. recites, that the legal estate and interest in the navigation, is vested in the trustees. The argument in this case turns entirely on the meaning of the word *navigation*, as there used. If it mean only the incorporeal right of cleansing and scouring the river for the purpose of making it navigable, it does not shew that they are owners of the bed of the river. It being clear that they have some right, we must refer to the statute 9 & 10 W. 3. to learn what that right is. According to *Rex v. Irwell and Mersey Navigation*, that statute gave to the undertakers an incorporeal right only. Then, assuming that to be so, there is nothing in the statute 14 G. 3. to shew that the legislature intended to give them any other right. During the period which elapsed between the time of passing the 9 & 10 W. 3. and the 14 G. 3., the company probably exercised the power of purchasing lands, and acquired corporeal property in those lands. The 110th section recites, that the legal estate in the navigation, as well as in the lands and buildings, is in the trustees. It vests nothing in them. The statute 9 & 10 W. 3. is the only one which vests property in them; and it gives the undertakers an incorporeal hereditament

ditament only in the bed of the river, and a corporeal hereditament in other things, messuages, and lands. But it has been said, that another clause gives to the persons having the legal estate and interest in the navigation, as well as the other property, authority to mortgage in fee the navigation, and the tolls arising therefrom, as well as the other property; and that the introduction of the word *navigation* was superfluous, unless it was thereby intended to give to the trustees of the navigation the power to convey the fee in a corporeal hereditament. The word navigation, however, would authorise the trustees, by the introduction of that word in the mortgage-deed, to give the mortgagee the right to cleanse and scour the river, and to make or maintain it navigable, and pass to the mortgagee the legal estate or interest which the trustees have in the incorporeal hereditament. That being so, there is nothing in the act of the 14 G. 3. to shew that the company are owners or occupiers of the bed of the river: and it is clear that under the first act they acquired an easement only in the bed of the river: in respect of which they are not liable to be rated.

LITLEDALE J. It is perfectly clear that the undertakers of the navigation took no interest in the soil of the bed of the river by the statute 9 & 10 W. 3., but a power only to be exercised in it for the purpose of making and maintaining the river navigable. But then it is said, that the recital in the 14 G. 3. s. 110. that the legal estate and interest in the navigation was vested in the trustees, and the power given to them by another clause to mortgage the navigation and the tolls arising there-

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therefrom, in fee, shew that they had the fee in corporeal property, viz. the bed of the river. That depends entirely on the meaning of the word *navigation* in those clauses. I think that that word, as there used, imports the power or right of navigating the river, and not any interest in the soil. That being so, it only recognised the incorporeal right given by the former statute. The undertakers, then, are not occupiers of land, and therefore not liable to be rated to the relief of the poor.

PARKE J. The rate is made on the undertakers of the *Aire* and *Calder* navigation, as occupiers. The question is, Whether they can be considered as occupiers of land. It is now established, that where parties have a mere easement in the bed of a river, they are not occupiers of the land covered with water. In this case, if the undertakers of the navigation have the soil, they must have acquired it by a contract with the former owners of the soil or by the act of parliament. Now, it is not even suggested that they acquired it by any contract with the former owners. It is conceded that the 9 & 10 W. 3. does not give the company the soil: but it is said that the 14 G. 3. does. Section 110. recites, that the legal estate and interest in the *navigation* is vested in the trustees. That must be the legal estate or interest already vested in the undertakers by the 14 G. 3. That was an interest in an incorporeal hereditament. The subsequent clause, which enables the trustees to mortgage in fee the navigation, does not carry the case further. It applies only to the legal estate vested in them, viz. the incorporeal right. The company were not occupiers of the land which constitutes the river, but
had

had a mere easement on it. They are not, therefore, liable to be rated.

Order of sessions quashed. The rate to be amended by striking out that part of the assessment on the defendants which respects the river *Aire*.

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The KING *against* The Inhabitants of TAUNTON
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UPON appeal against an order of two justices, whereby *W. G. Palmer*, his wife and children, were removed from the parish of *Taunton Saint James* in the county of *Somerset*, to the parish of *Melverton* in the same county, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The pauper, aged about thirty-eight years, lived in the parish of *Langford Budville* in the said county, till he was about seven years of age, when he was bound apprentice by the parish officers to *Mr. John Locke* of that parish, yeoman, and served him in that parish till he the pauper was twenty-one years old. The pauper afterwards, at *Lady-day* 1811, hired himself as servant in husbandry for a year from that time to *Mr. Thomas Handford* of *Melverton*; and after serving him there three months, having at *Christmas* preceding volunteered into the local militia, he went out into actual service for three weeks, and then returned to *Mr. Handford's* service till *Lady-day* 1812, and then received his

A local militiaman hired himself at *Lady-day* 1811, to serve for a year, without communicating the fact of his being in the militia to the person with whom he so contracted. By the local militia act then in force, the 48 G. 3. c. 111. s. 15., it is provided, that no ballot, enrolment, and service under that act shall make void or in any manner affect any indenture of apprenticeship or contract of service between any master or servant, notwithstanding any covenant or agreement in such indenture or

contract; and no service under that act, of any apprentice or servant, shall be deemed to be an absence from service: Held, that that section of the statute applied only to contracts existing at the time of the ballot or enrolment, and not to contracts subsequently made; and, therefore, that the pauper, at the time when he hired himself, was not capable of making an absolute contract to serve for a year, and, consequently, that he was not lawfully hired for a year, and gained no settlement.

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wages, after deducting for the three weeks he was absent in the militia. The pauper's agreement with Mr. *Handford* was for a year's service, at the wages of 11*l*. and his board and lodging, &c. The pauper did not tell Mr. *Handford*, when he first bargained with him, that he was in the militia; but told him a week or two afterwards; and he Mr. *Handford* said that did not signify, for the pauper could at the end of the year deduct for the time he was absent.

Rogers and *Bere* in support of the order of sessions. In *Rex v. Holsworthy* (a), it was held that a militia-man who hired himself for a year, and performed a year's service under that contract, might gain a settlement by such hiring and service; provided he at the time of hiring communicated his disability to the master, and provided the militia was not called out during the year. Mr. Justice *Holroyd* there puts the case on the ground that the pauper, at the time of the hiring, was not capable of making an absolute contract, so as to give the master a control over him during the whole year; and that, not having communicated to the master his disability, he had not made a conditional contract. Here the pauper, when he first hired himself, did not communicate to his master his disability; he therefore entered into an absolute contract, which he was incapable of doing. That case, therefore, is precisely in point. It is true, that the pauper, within a week or two after he had hired himself, communicated his disability to his master. Assuming that to be a conditional contract, it was not for a year. *Rex v. Ruthall* (b) is in point.

(a) 6 B. & C. 283.

(b) 7 East, 471.



was amended by the 49 G. 3. c. 40. and c. 82., and the 50 G. 3. c. 25., but there were no alterations introduced into those statutes so as to affect this question. All the former acts were repealed on the 20th of April 1812, by the 52 G. 3. c. 68. The sixty-third section of that act contains the same provision as to service. [Bayley J. There the words, by reference to the sixtieth section, evidently apply to contracts existing at the time of the ballot or enrolment, and not to contracts subsequently made. That is a legislative exposition of their meaning; for the same words, applied to the same subject-matter in statutes in *pari materia*, ought to receive the same construction.] The words of the 48 G. 3. c. 111. must be construed according to their plain and ordinary sense, as they occur in that statute, and not by reference to the sense in which they are used in another statute made many years afterwards.

BAYLEY J. This case depends entirely on the construction of the fifteenth section of the 48 G. 3. c. 111. The statute of the 3 W. 3. c. 11. requires, that in order to gain a settlement by hiring and service, the party shall be lawfully hired for a year. It has been established by several decisions, that a party at the time of the hiring must be, *sui juris*, so as to be competent to give that species of service which he contracts to give. Upon this principle it has been held, that neither a deserter (a) from the king's service, nor an invalided soldier (b) having leave of absence, nor a militia-man, can lawfully hire themselves for a year so as to gain a settlement. In *Res v. Holsworthy* (c), a person who had been enrolled as a

(a) *Res v. Norton*, 9 East, 207.

(b) *Res v. Deaulieu*, 3 M. & S. 229.

(c) 6 B. & C. 283.

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substitute in the militia hired himself for a year, and performed a year's service under that contract: and it was held, that as it did not appear that the pauper at the time of hiring, informed the master that he was a militia-man, no settlement was gained by a year's service under such contract. Now that decision applies to the present case, unless it be distinguishable from it by reason of the enactment contained in the 48 G. 3. c. 111. s. 15. That clause provides, "that no ballot, enrolment, and service under that act, shall extend to make void, or in any manner to affect any indenture of apprenticeship, or contract of service between any master or servant, notwithstanding any covenant or agreement in any such indenture or contract, and no service under that act of any apprentice or servant shall be deemed or construed or taken to be an absence from service, or a breach of any covenant or agreement as to any service, or absence from service, in any indenture of apprenticeship or contract of service, any thing contained in any act or acts of parliament, or law or laws, or deed or indenture of apprenticeship, or contract of service, to the contrary notwithstanding." These words will undoubtedly apply to all indentures of apprenticeship, or contracts of service existing at the time of the ballot or enrolment, as well as to those made afterwards. The question is, whether they include all contracts whatever, or those only which were in existence at the time of the ballot or enrolment. Now, in order to ascertain the sense in which they are used in this act of parliament, we may fairly look to other acts of parliament relating to the same subject-matter; and if we find these very words used in a restrained sense in those acts, we ought to construe them in the same sense in this

this act, for it is a fair rule of construction, that the same words in a statute in *pari materia* respecting the same subject, should receive the same meaning. No such words are to be found in the 42 G. 3. c. 90., but they are found in the 52 G. 3. c. 68. s. 63.; and if, as used in that statute, they apply to contracts existing at the time of the ballot or enrolment, that is a legislative exposition of them, and they ought to receive the same construction in the 48 G. 3. c. 111. s. 15. Now, those words in the 52 G. 3. c. 68. s. 63. manifestly apply to contracts existing at the time of the ballot or enrolment, and not to contracts subsequently made. The sixtieth section enacts, that the enrolment of servants shall not vacate or rescind contracts between master and servant unless the local militia shall be called out, or unless the person enrolled shall leave the service for the purpose of being trained. That section applies to contracts existing at the time of the enrolment, for such contracts only could be vacated or rescinded by the enrolment. Section 63 is a transcript of the fifteenth section of the 48 G. 3. c. 111. It begins "provided always," and then proceeds in the same words. Now a proviso is something engrafted on a preceding enactment, and the proviso in the sixty-third section manifestly applies to the enactment in the sixtieth section, that the enrolment shall not rescind contracts made between master and servant. But that enactment applied to contracts existing at the time of the ballot or enrolment. The words of the proviso, therefore, apply to the same species of contracts. Then that being the fair meaning of the words used in the 52 G. 3. c. 68., they ought to receive the same construction in the 48 G. 3. c. 111. s. 15., and giving them that construction, there is nothing in that statute enabling such a person to make an absolute contract
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principle, give the words a limited construction, and hold that they extend only to contracts existing at the time of the ballot or enrolment. Putting that construction on those words, a party, in order to gain a settlement by a contract of hiring made after ballot or enrolment, must disclose his disability to the person with whom he contracts. This would be the construction I should put upon those words if the 48 G. 3. c. 111. had stood by itself. But the local militia act, 52 G. 3. c. 38. s. 63., contains an enactment in the same words, and by the sixtieth section of that statute those words are confined to contracts between masters and servants existing at the time of the ballot or enrolment. Now, where in two statutes in *pari materia* the same words occur, and in one of them the meaning is clear and in the other doubtful, I think we ought to call in aid the meaning put upon those words by the legislature in the statute where they are not ambiguous, and give them the same meaning in the other statute. We violate no rule of construction, by giving to the same words in two acts of parliament relating to the same matter the same meaning. I think, therefore, that if there be any ambiguity in the words of the fifteenth section of the 48 G. 3. c. 111., it is removed by the legislative exposition put upon the same words in the 52 G. 3. c. 68., I think, therefore, there was no lawful hiring for a year.

PARKE J. The question is, Whether at *Lady-day* 1811 there was a lawful hiring for a year. Assuming that the subsequent conversation between the master and servant amounted to a second hiring, it was not for a year, but for a less period. To constitute a lawful hiring,
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the party must have a power to contract to serve for the period during which he agrees to serve. *Rex v. Holsworthy* (a), shews that if a party is under a disability, he may, by disclosing it to the person with whom he contracts, make a conditional hiring. But if he does not disclose it, it is an absolute contract which he is not capable of entering into, and therefore not a lawful hiring. Here there was no disclosure. Then the only question is, Is there any enactment in the 48 G. 3. c. 111. giving a local militia-man a power to make an absolute contract of hiring? It cannot be intended that the legislature meant to give such a power, for they might thereby enable a party by law to commit a fraud; the master would contract on the supposition that the party with whom he contracts had power to bind himself to serve for a year; the latter knowing all the time that he had not. But on the other hand, it might properly be provided that a contract made *bonâ fide* while the party was a free man, capable of contracting, should not be avoided by reason of his subsequently becoming a militia-man. The statute does not in terms enact that an enrolled person shall be *sui juris*. The words of the fifteenth section of that statute apply to contracts actually entered into at the time of the ballot or enrolment. No such power, therefore, is given by express words, or by necessary implication. Coupling the fifteenth section with the twenty-fourth, it appears to me doubtful whether a volunteer and a balloted man are thereby placed precisely in the same situation. But assuming that they are, all that the legislature says is, that if a master contracts with a freeman the master must

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(a) 6 B. & C. 283.

take his chance in case of a ballot, and shall not contract against the chance of ballot; for such contract is made void. But there is no provision that a party shall have the same capacity to contract as if he was not a local militia-man. No power therefore is given to enter into an absolute contract to hire himself for a year. Here the pauper entered into an absolute contract when he had no power to do so. There was no lawful hiring for a year, and no settlement was gained.

Order of sessions confirmed.

WENTWORTH, Gent., one, &c.; *against* BULLEN,
Gent., one, &c.

By a *cognovit*,
A. confessed
the action, and
that *B.* had sub-
stained damage
to the amount

DECLARATION stated that before the committing of the grievances thereafter mentioned an action of covenant had been commenced, and was pending, at of 3000*l.*; and that in case *A.* should make default in payment of 259*l.* on the 7th of *May*, *B.* should be at liberty to enter up judgment for 3000*l.*, and sue out execution for 259*l.* and costs, which would have left a principal sum of 1650*l.* due to *B.* *A.* not having paid the 259*l.* on the 7th of *May*, *B.* entered up judgment, and sued out execution for 3011*l.*, indorsed with a direction to the sheriff, requiring him to levy 1967*l.*, and *A.* was arrested, and detained in prison for that sum: Held, that *A.* might maintain an action against *B.* for having caused him to be arrested and imprisoned for a larger sum than he ought.

After the arrest, *A.* applied to a Judge at chambers to be discharged out of custody; and it being represented, that by *A.*'s continuing in prison, he would commit an act of bankruptcy, the Judge, on the 4th *December* 1827, made the following order:—"Upon hearing counsel for the plaintiff and defendant, I order that the defendant be discharged out of the custody of the sheriff of the county of *Cambridge*, as to this action, upon giving a fresh warrant of attorney for the sum of 5000*l.*, with a defeasance on payment of 259*l.* 11*s.* 7*d.* and the costs on the 4th day of *January* next, and the further sum of 1650*l.*, with the interest due thereon on the 4th of *August* next, with liberty to issue execution for the smaller sum, if not duly paid; and afterwards for the larger sum, if default be made in the payment of the said sum of 1650*l.* and interest, on the said 4th of *August* next; and upon giving such warrant of attorney, the present judgment be set aside, and that the mortgage do remain as a security, the defendant hereby undertaking not to bring any action for the imprisonment." *A.* did not avail himself of the order:

Held, by *Park J.*, that this order embodied an absolute agreement of the parties, founded upon good consideration that *A.* should be forthwith discharged out of custody, and that he should bring no action for false imprisonment, and, therefore, that such an action was not maintainable.

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any writ of error, nor file any bill in equity, nor do any other matter or thing whatsoever to delay the defendant (the then plaintiff) from entering up his judgment or suing out execution thereon as aforesaid. Averment, that under colour and by means of the said confession, the said defendant afterwards, in *Trinity* term 1827, entered up judgment in the Court of K.B. in the said action of covenant; and that the judgment being so entered up, and default being made in payment of the sum of 259*l.* 11*s.* 7*d.*, together with the costs in that behalf mentioned, on the 7th of *May*, although the defendant ought only, according to the terms of the cognovit and his duty in that behalf, to have sued out execution for the sum of 259*l.* 11*s.* 7*d.*, the costs of entering up such judgment and suing out execution thereon, officers' fees, sheriff's poundage, and incidental expenses, yet the defendant contriving, &c. to injure the plaintiff, on the 4th *July* 1827, to wit, at, &c., wrongfully caused a ca. sa. to be issued under colour of the said judgment, for the sum of 3011*l.*, indorsed with a direction to the sheriff requiring him to levy 1967*l.* 12*s.* 8*d.* besides sheriff's poundage, officers' fees, and other incidental expenses. The declaration then stated the delivery of the writ to the sheriff, the arrest of the plaintiff, and his detention in custody for the sum indorsed on the writ, whereas according to the terms upon which the action was confessed, the writ ought to have been indorsed to levy 259*l.* only, and the costs, fees, sheriff's poundage, officers' fees, and other incidental expenses mentioned in the cognovit; by means whereof the plaintiff had been taken, and during all the time aforesaid detained in execution as aforesaid, for a much larger sum of money than that for which he ought to have been
taken

taken and detained as aforesaid; by means whereof the said plaintiff was hindered and prevented from obtaining his liberation from the said custody and imprisonment, and was forced and obliged to, and did remain in custody and in prison as aforesaid from thence hitherto, and also until his so remaining in custody and in prison as aforesaid became and was an act of bankruptcy, and he by means thereof became and was a bankrupt; and thereupon afterwards a certain commission of bankruptcy was issued against him, the plaintiff, and he, the plaintiff, thereupon, in order to prevent the said commission from being prosecuted and proceeded with, was forced and obliged to and did execute and make an assignment of certain property of him, the plaintiff, for the benefit of his creditors; and thereby and by means of the premises aforesaid the plaintiff was not only hindered and prevented from following and attending to his profession and business of an attorney and solicitor, but was put to a great expense of his monies, to wit, to an expense of 500*l.*, and thereby and otherwise greatly injured and damnified, to wit, at, &c. Plea, not guilty. At the trial before *Alexander C. B.*, at the Summer assizes for the county of *Cambridge* 1828, the plaintiff proved the cognovit bearing date 14th *March* 1827, as well as the judgment in the cause of *Bullen v. Wentworth*, mentioned in the declaration, and the issuing of the ca. sa. indorsed to levy 1967*l.* 12*s.* 8*d.*, and the arrest of the plaintiff (*Wentworth*) thereon on the 17th of *November*; that a summons was obtained for setting aside that execution with costs, and for discharging the plaintiff (*Wentworth*) out of custody of the sheriff; and that the attorney on each side attended on the 4th day of *December* 1827, before Mr. Justice

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Bayley, when it was represented that Mr. *Wentworth* by remaining in custody a few days longer would commit an act of bankruptcy; in order to avoid which it was a great object for him to get out of custody. The following order was made: — “*Bullen, gent., one, &c. v. Wentworth.* Upon hearing Mr. *Wightman* of counsel for the plaintiff, and Mr. *T. N. Talfourd* of counsel for the defendant, I order that the defendant be discharged out of the custody of the sheriff of the county of *Cambridge* as to this action, upon giving a fresh warrant of attorney for the sum of 5000*l.*, with a defeasance for payment of 259*l.* 11*s.* 7*d.*, and the costs, on the 4th day of *January* next; and the further sum of 1650*l.*, with the interest due thereon, on the 4th of *August* next; with liberty to issue execution for the smaller sum, if not duly paid, and afterwards for the larger sum if default be made in the payment of the said sum of 1650*l.*, and interest, on the said 4th of *August* next, and upon giving such warrant of attorney the present judgment be set aside, and that the mortgages do remain as a security, *the defendant hereby undertaking not to bring any action for the imprisonment.*” In consequence of some misunderstanding between the respective attornies, the order for his (*Wentworth's*) discharge was not sent down, and he continued in prison until he committed an act of bankruptcy, and a commission was issued against him. He took no advantage of the order of Mr. Justice *Bayley*. It appeared further that *Wentworth's* mother, if he had been taken in execution for no more than 259*l.*, would have paid the debt, and released him from imprisonment. The Lord Chief Baron was of opinion that the action was maintainable, and directed the jury to find for the plaintiff.

plaintiff. The jury found a verdict for the plaintiff, 150*l.* damages. A rule nisi had been obtained for entering a nonsuit, on the ground that the action was not maintainable, or for a new trial, on the ground that the damages were excessive.

F. Kelly and *Gunning* now shewed cause. There is no ground for entering a nonsuit, because no point was reserved or made at the trial. It was left as a question to the jury, whether it was the fault of the plaintiff or the defendant that the order of Mr. Justice *Bayley* was not acted upon. The jury thought it was the fault of the defendant, and therefore gave 150*l.* damages. The damages are not excessive. Secondly, the action is maintainable. Here, *Bullen* having a right to take *Wentworth* in execution for a small sum of money, caused the latter to be arrested for a much larger sum. The act of causing him to be imprisoned for the larger sum was wrongful and injurious, and if any damage has arisen from such wrongful act, an action is maintainable. The declaration alleges, that by reason of *Wentworth's* having been detained in prison for a larger sum than he ought to have been, he was prevented from obtaining his liberation and committed an act of bankruptcy; and there is proof, that if he had been detained for the smaller sum, his mother would have paid the debt and released him from prison. It is clear that *Bullen* was not entitled to take *Wentworth* in execution for more than 25*l.* A cognovit is a contract, whereby the plaintiff, in consideration of the defendant's confessing judgment, undertakes to enter up judgment and issue execution for the sum, and at the time agreed upon between the parties. Here the agreement manifestly was,

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was, that execution should be taken out for no more than 259l.; and if even there be any doubt on the terms of the warrant of attorney, it ought to be construed in favour of liberty.

Storks Serjt., Joshua Evans, and Wightman, contra. An action is not maintainable for issuing execution for too large a sum. The remedy is by application to the equitable jurisdiction of the Court. *Bullen* had, at all events, a right to take *Wentworth* in execution for the smaller sum, and there not having been any offer to pay that sum, the imprisonment was not wrongful. [*Parke J.* The action is substantially founded on the contract contained in the cognovit. By the terms of that contract *Bullen* had no right to issue execution for any larger sum than 259l. *Wentworth* could not bring trespass, because the imprisonment was pro tanto justifiable, but he might maintain an action on the case.] According to the true construction of the cognovit, *Bullen* had a right to issue execution for the whole debt after a reasonable time had elapsed. The intention of the parties must be collected from the whole instrument. *Wentworth* owed *Bullen* the larger sum, and it must have been intended that the whole sum should be paid. But if *Bullen* sued out a ca. sa. for the smaller sum, the judgment would have been at an end. It could not, therefore, have been the intention of the parties that *Bullen* should, in consideration of being allowed to take out execution against the person of his debtor for 259l., be deprived of the benefit of a judgment for a much larger sum. [*Parke J.* The parties did not foresee the consequence, that the judgment in an action on the securities was a bar to any other action, and

and that execution by a *ca. sa.* on that judgment was a bar to any other remedy upon it, but this oversight of the parties and its consequence will not allow us to put a construction on the instrument which the words will not warrant, (though the Court, when application was made to its equitable jurisdiction for favour, very properly insisted upon the applicant doing equity by supplying the defect, and if an action had afterwards been brought on the original securities, as the intention may be inferred from the *cognovit* that they should remain in force, probably the Court would have restrained the plaintiff from pleading a judgment recovered or setting it up as a bar.)] [*Bayley J.* If *Bullen* had sued out a *fieri facias* for the smaller sum, the judgment would have remained unsatisfied.] The presumption is, that a *fieri facias* would have been useless, because no reasonable man would sue out a *ca. sa.* if he could take property in execution. But assuming that *Bullen* had no right to take *Wentworth* in execution for more than 259*l.*, the order made by Mr. Justice *Bayley* is a conclusive answer to the action. That order embodies the agreement of the parties. One part of that agreement is, that *Wentworth* shall not bring any action against *Bullen* for the imprisonment. That is an answer to this action on the same principle, that an award of an arbitrator is conclusive on the parties to the submission. The bringing of this action is a fraud on that order.

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BAYLEY J. We are all of opinion that there ought to be a new trial in this case, on the ground that the damages were beyond all question disproportionate to the injury which the plaintiff had sustained. It appears that *Bullen* had acted with great forbearance towards
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Wentworth. There was a debt of 1800*l.* due from *Wentworth* to *Bullen*, and an action being depending, *Bullen* agreed to take 259*l.* 11*s.* 7*d.* at a future day, and to accept a cognovit as security for the residue of the debt. That security was unadvisedly taken, because, when once an execution upon a judgment is taken against the body, all the remedy on the judgment is gone. *Bullen* did not sue out execution until a considerable period after the time when the 259*l.* ought to have been paid, and he then issued a capias ad satisfaciendum, with a direction to levy not 259*l.* 11*s.* 7*d.*, but the whole amount of the debt. In that respect he was wrong, but the jury gave damages greatly disproportionate to what, upon a sober consideration of the subject, ought to have been given, and upon that ground we are of opinion that there ought to be a new trial on payment of costs. My Brother *Parke* entertains doubts whether the action be maintainable. That circumstance may perhaps induce the parties to come to some arrangement instead of having another expensive trial at the assizes.

LITLEDAL J. concurred.

PARKE J. I agree with the rest of the Court that there should be a new trial on the ground of excessive damages, but I feel considerable doubt whether the action is maintainable.

I am satisfied that an action for issuing execution for too much will lie. It is in substance an action for a breach of contract; by the cognovit the plaintiff gave judgment on terms; those terms, when acceded to, constituted an agreement between the parties, which was founded on a good consideration; it was in consideration that

that the plaintiff confessed judgment, the defendant undertook to issue execution for 259*l.* only, that is, he undertook not merely that the plaintiff should be let out on paying 259*l.*, but that he should always be in a condition to be let out whenever he chose to pay the sum. Such a limitation of the sum could only be accomplished by a direction to the sheriff, either by memorandum indorsed on the writ, or by some note or parol order to discharge him on payment of the smaller sum. As no such direction was given, the agreement was broken. It would have been broken by issuing a writ without any qualifying memorandum, and a fortiori with a memorandum to levy a larger sum. It is said that the plaintiff sustained no damage, for he was lawfully imprisoned, and imprisonment was the gravamen, but the condition of a prisoner is materially different when he is charged in execution for a large and for a small sum; in the latter case his friends may make efforts to relieve him, which they would not in the former.

An application to the equitable jurisdiction of the Court would fall short of doing complete justice, for it gives no damages. Such an application is the only remedy where the right is an equitable one, as in the case of bonds where execution is issued for too much; but if an *agreement* has been made and broken, an action must on general principles lie, and it is no answer to say that there is another remedy; still less a defective remedy for the wrong. The doubt I feel arises from the Judge's order.

It was urged that this order was in the nature of an award, and an award, if good, is no doubt a bar to an action for a matter referred: but a Judge acting upon interlocutory motions, is in no respect an arbitrator; he decides

decides no cause of action, none are meant to be referred to him. I think it clear that the order is no answer to this action on that ground. But in considering the terms of this order, I am inclined to think that there is evidence of a mutual agreement between the parties, upon good consideration, to forego the action for charging the plaintiff in execution for too much : and an agreement giving the plaintiff a remedy for the breach of it, or an accord executed, where there was no remedy by action upon the accord itself, is a bar to an action for unliquidated damages, *Case v. Barber* (a), *Crofts v. Harris* (b). Now though there is no remedy for disobedience of a Judge's order (as such) by one of the parties against another by action, but by attachment merely, yet if it be made by the consent of both, and is founded on a binding agreement, an action will not the less lie upon that agreement, though it have also the additional sanction of a Judge's order. The contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of the Judge. The case of an agreement to refer by order of a Judge, is a familiar instance; many actions being brought upon such agreements.

Now upon reference to this order, though it is not drawn up *by consent*, the question is, whether we do not infer necessarily from its provisions that it was so. What was ordered to be done, the Judge had no power to order without consent, he could not properly discharge from the execution altogether, because it was for too much; he could not order the parties to give and

(a) *Sir T. Raym.* 450.(b) *Carth.* 187, 188.

accept a new warrant of attorney without such consent. I think, therefore, that it must be intended that both parties *agreed*, when the order was drawn up. Is it then to be considered as a conditional order, as if it had been then expressed, in case *Wentworth* chooses to be discharged, he shall, on giving a new warrant of attorney, *and in that case* he must undertake not to bring an action; or is it to be deemed a mutual agreement then completely made, that *Bullen*, the plaintiff in the first action, should discharge *Wentworth* the defendant, forthwith, *Bullen* thereby consenting to an unconditional discharge, and the defendant *Wentworth* agreeing to bring no action? Did *Bullen* mean to consent that *Wentworth* should have his option either to bring his action or be discharged conditionally; or did both parties mean that the discharge was at all events to take place unconditionally, and the action at all events abandoned? My opinion inclines to the latter construction, and therefore it seems to me that the action is not maintainable.

Rule absolute for a new trial.

BLACKET *against* BLIZARD and Another.

PROHIBITION. The declaration alleged that the defendants contriving, &c. had lately cited the plaintiff before, and drawn him into a plea in the eccle-

The commissioners for building and enlarging churches having, pursuant to the statutes 58 G. 3. c. 45. and the 59 G. 3. c. 30., appointed twenty-six persons to be a select vestry, for the care and management of a church, and all matters relating thereto: *Held*, that, in order to constitute a good assembly of the select vestry so appointed, there must be present a majority of the number (*viz.* fourteen) named in the appointment; and, therefore, that a rate for the repair of the church, made at a meeting where there was not such a majority, was illegal, and that payment of such a rate could not be enforced in the ecclesiastical court.

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siastical court, to compel him to pay a certain rate made to defray the repairs of the church of the district parish of *St. Matthew, Brixton*, in the parish of *Lambeth*, in the county of *Surrey*, by libelling in the spiritual court against the plaintiff in manner following; that pursuant to the provisions of the 58 G. 3. c. 45. and the 59 G. 3. c. 134., an additional church was erected in the parish of *St. Mary, Lambeth*, in the said county; that the commissioners under those acts, with the consent of the diocesan, determined that it should be a *district church*, and be called *St. Matthew, Brixton*; that it was consecrated, and that ever since such consecration divine service was performed therein; that his majesty, by order in council on the 20th of *November 1824*, directed a district or portion of the said parish to be assigned to the new church, and the same was assigned thereto; and the commissioners appointed by the aforesaid acts, by an instrument in writing under their common seal, with the consent of the then Lord Bishop of *Winchester*, appointed the Rev. *G. D.* rector of the parish of *St. Mary, Lambeth*, the Rev. *E. R.* the licensed curate of the said district church, and several other persons therein mentioned, being twenty-six substantial inhabitants of the said district, and their successors, to be a select vestry for the care and management of the church of *St. Matthew, Brixton*, and all matters and things relating thereto, and with all such powers and authorities as the commissioners (with the advice of the Bishop of *Winchester*) were authorized and empowered to appoint a select vestry for the care and management of the churches built under the authority of the said acts of parliament; and that such select vestry and their successors afterwards had and then did manage the concerns

cerns of the said district church of *St. Matthew, Brixton*, and all matters relating thereto; that certain sums of money being required to defray the necessary expenses relating to the repairing the district church, a meeting of the select vestry of that church was, on the 2d of *August* 1827, held, and at such meeting the said select vestry had resolved, with the concurrence of the churchwardens, that a rate for and towards the repairs of the said district church should be made, and that every inhabitant and occupier of lands, messuages, tenements, &c. rateable within the district should be taxed and pay after the rate of 3*d.* in the pound, and that after the select vestry had so resolved, a rate was accordingly made by them, and on the 11th of *August* that rate was duly allowed and confirmed; that the plaintiff was rated at 12*s.* 6*d.*, being at the rate of 3*d.* in the pound for the yearly rent of 50*l.*, and at the time of making that rate was a parishioner and inhabitant of the district of *St. Matthew, Brixton*, and occupied a house and premises of the annual value of at least 50*l.*, and was by the rate aforesaid duly and justly rated at the sum of 12*s.* 6*d.*; that the defendants at the time of making the rate, and commencement of the suit, were churchwardens of *Brixton*; that the said 12*s.* 6*d.* so rated upon the plaintiff was then due to them; that the plaintiff had, upon request, refused to pay the rate; that in consequence of plaintiff's refusal to pay the rate, the defendants, in virtue of the powers contained in the 53 G. 3. c. 127., summoned the plaintiff before two justices, when he objected to the validity of the rate, whereupon the justices declared, that under the said act 53 G. 3. they had no jurisdiction, and that the validity of the rate must be determined in the ecclesiastical court. The

declaration then averred, that the rate mentioned as aforesaid was made and subscribed at a meeting of the said select vestry, at which meeting *a majority of the select vestrymen were not present, but only the churchwardens and five others of the select vestry*, and was made for and towards the repairs of the said district church; that although all the before-mentioned matters and things were proved to the ecclesiastical court, and the plaintiff alleged and shewed to the spiritual Judge that the select vestry had no right either by the said acts of parliament or otherwise howsoever to make any such rate for repairs of the said district church, and that the true intent and meaning of any act or acts of parliament ought to be tried and determined at the common law in the king's court of record, and not in the ecclesiastical court, and that the rate was not made and subscribed by a sufficient number of the select vestry, and, therefore, prayed the spiritual Judge to reject the said libel and dismiss the said suit, nevertheless the spiritual Judge had admitted the libel. The declaration concluded in the usual form, that the defendants continued to prosecute the plea in the ecclesiastical court, notwithstanding the king's writ of prohibition. The defendants demurred generally to the declaration. Joinder in demurrer.

Comyn in support of the demurrer. There are two questions in this case; first, whether a select vestry appointed by the commissioners for building new churches pursuant to the power vested in them by the 59 G. 3. c. 134. s. 30., has authority to make a rate for the repairs of a church; or, whether such rate must be imposed by the parish at large; and, secondly, assuming that



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chapels are to be made by the districts to which they respectively belong, by rates to be raised within the district, in like manner as in case of repairs of churches by parishes. Now, by common law a rate for the repair of a church might be made by the parishioners and churchwardens; or, if the parishioners did not attend after notice, by the churchwardens alone. A select vestry is a representative body of the parish, consisting of substantial inhabitants of the district. If after notice the vestrymen do not attend a meeting convened for the purpose of imposing a rate, it would seem that it might be imposed by the churchwardens alone.

J. Evans contra. It is a general rule of law, that whenever a power of a public nature is given by law to a definite body, it must be executed by a majority in number of the persons constituting that body. That was considered to be the rule of law in *Grindley v. Barker (a)*, *Cook v. Loveland (b)*. In those cases the bodies to which the rule was applied were not integral parts of a corporation. There is no distinction in this respect between a definite body created by the king by virtue of his prerogative alone, and one created by an appointment made by commissioners in execution of a power given to them by act of parliament. The reason assigned for the rule in the former case is, that where by charter the crown constitutes a corporate body, or any integral part of a corporate body, composed of a certain defined and specified number of individuals, and by the same charter gives certain powers and authorities

(a) 1 Bos. & Pul. 229.

(b) 2 Bos. & Pul. 31.

to the body so constituted, it cannot be supposed that the crown intended that the power and authority so given to a body consisting of such a defined number of persons, should be exercised by a much smaller number, as by only two or three, *Rex v. Bellringer* (a), *Rex v. Devonshire* (b), *Rex v. Greet* (c). That reason applies to a definite body created by act of parliament as well as to one created by the crown. Here the select body claim a power of making rates, and taxing the inhabitants, — a power as important as any possessed by any corporate body. If it be necessary, therefore, in the case of a corporate body created by the crown, that a majority of each definite part must be present at a corporate meeting, it seems to follow, by parity of reason, that to constitute a good meeting of a select vestry created by act of parliament to discharge a public trust, a majority of the members constituting that body must be present.

BAYLEY J. I take it to be a general rule of law, that where a public trust is to be executed by a definite number of persons, it must be executed at a meeting where a majority of that number is present, unless there be a usage or custom to the contrary. It is different from a trust or power of a private nature, for that must be executed by all the persons to whom it is given. There are several cases which bear upon this subject, and which fully warrant the position which I have stated. In *Cook v. Loveland* (d), the crown by letters patent, granted to the master and wardens of the corporation of bakers (there being four wardens), by

(a) 4 T. R. 810.

(b) 1 B. & C. 609.

(c) 8 B. & C. 363.

(d) 2 Bos. & Pul. 31.

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themselves or their deputy or deputies, full power to overlook and correct the trade of baking; and it was held, that the master and one warden could not justify entering the house of a baker to overlook bread; for if they acted as principals, they did not amount to a majority of the persons to whom the power was given, and if they acted as deputies, it should have appeared that they were appointed by the majority. In *Rex v. Beeston* (a), the statute 9 G. 1. c. 7. s. 4. having enabled the churchwardens and overseers, with the consent of the major part of the parishioners, to contract for the providing for the poor, it was held not to be necessary that all the churchwardens and overseers should contract, but it was considered to be clear that the concurrence of a majority was essential. In *Withnell v. Gartham* (b), a power granted by deed to appoint a schoolmaster to an ancient foundation, given to the vicar and churchwardens (of whom there were eleven), and in case of their neglect in appointing, then to devolve to two corporate bodies in succession; and to result, in the dernier resort, to the same vicar and churchwardens, to whom also the general power of managing the trust was committed, was held to be well executed by the vicar and a majority of the churchwardens. It seems to have been considered that an appointment by less than the majority would be bad. *Lawrence J.* says, "In general it would be the understanding of a plain man, that where a body of persons is to do an act, a majority of that body would bind the rest." It is clearly established, that where in a corporation there is a definite body, a majority of that

(a) 3 T. R. 592.

(b) 6 T. R. 388.

definite

definite body must not only exist at the time when any act is to be done, but a majority of that body must attend the assembly where such act is to be done, *Rex v. Bellringer* (a), *Rex v. Miller* (b), *Rex v. Bower* (c). In *The Queen v. The Bailiffs of Ipswich* (d), Holt C. J. lays it down, that unless a commission of the peace nominates a quorum, all the justices appointed by it must attend at a sessions. In *Grindley v. Barker* (e) the point decided was, that if a power of a public nature be committed to several, who all meet for the purpose of executing it, the act of the majority will bind the minority. But it is impossible to read that case without seeing that the Judges were of opinion there must be a majority of the body present. No case has been cited to shew that any number less than a majority of a definite body, is capable of doing any act which that body is authorized to do. Here the select vestrymen were called upon to do an act requiring judgment and discretion, and calculated to affect the property of others. Unless it be essential to constitute a good select vestry, that there should be a majority in number of those constituting the body, it would be impossible to predicate what number would be necessary. In the case of an ancient select vestry, the number might possibly be ascertained by custom or usage; but even that custom or usage must be presumed to have been founded on some quorum clause contained in the instrument by which the select vestry derived its authority from the parishioners. But in the case of a

(a) 4 T. R. 810.

(b) 6 T. R. 268.

(c) 1 B. & C. 492.

(d) 2 Ld. Raym. 1252.

(e) 1 Bos. & Pul. 229.

modern select vestry, where the number cannot be ascertained by usage or custom, the public would have no security that there should at all times be a number of vestrymen sufficient to discharge the duties committed to the vestry, unless the rule of law, which requires that a public trust committed to a definite number of persons should be executed at a meeting where a majority of that number is present, prevails. If the legislature thought that a greater number than the majority of those constituting the vestrymen should in any particular case attend, they might have so provided in express terms, as they have in one instance, by the 58 G. 3. c. 45. s. 60. But I think that in all cases where the legislature have not expressly so provided, the general rule of law ought to prevail. That being so, the rate which was imposed at a meeting of the select vestry, where there was not such a majority present, is bad. The judgment of the Court must, therefore, be for the plaintiff. I have mentioned the point to Lord *Tenterden* (a), and he concurs in the judgment.

LITLEDALE J. It is a well-established rule, that in order to constitute a good corporate assembly in the case of a corporation consisting of a definite and indefinite body, there must be present a majority of that number of which the definite body consists, although it is not necessary that there should be a majority of the indefinite body. Now a select vestry is a defi-

(a) The same question had been argued at the sittings in banc. after last *Easter* term, in a cause of *Freeman v. Meymott*. But the Court having been informed that the same point was depending in this case, deferred their judgment. After the Court had delivered judgment in this case, they said that *Freeman v. Meymott* must be governed by it.

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nite body, consisting of persons having a special public trust reposed in them. They, therefore, resemble in their functions a definite body in a corporation. It has been said that corporations derive their powers from charters granted by the crown, and that the rule laid down that a majority of a definite body must be present to constitute a good corporate assembly is one deduced by construction from the terms of the charter and the presumed intention of the grantor. It may, however, be fairly supposed that the king would grant to corporate bodies powers consistent with the general rules of law. There may be two objects in appointing a select vestry. One may be to prevent tumultuous meetings, which might otherwise occur in populous parishes, if the whole body of the parishioners were called upon to meet. Another may be, that in all cases there should be a sufficient number of persons to execute the duties reposed in the vestry. The latter object can only be attained by requiring that some specific number of the select vestrymen should be present to constitute a good assembly. The statute 58 G. 3. c. 45. s. 60. has in one instance required the concurrence of four fifths of the select vestrymen. But in other cases it does not in terms require any specific number. I am of opinion that, by analogy to corporations and other cases where public in contradistinction to private trusts are to be executed by definite bodies, there ought, to constitute a good assembly of a select vestry, to be present a majority in number of the persons who constitute the select vestry. There not having been such a majority present at the meeting where the rate in question was imposed, it is bad, and, consequently, there must be judgment for the plaintiff.

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PARKE J. The same rule of construction ought to prevail in a statute whereby the king, with the advice and consent of the lords spiritual and temporal, and commons, in parliament assembled, grants certain powers of a public nature to a definite number of persons, as in a charter whereby the king by virtue of his prerogative alone grants similar powers to a definite body. It was clearly established in *Rex v. Bellringer* (a), as a rule of construction applicable to charters, that where the king grants that the mayor and common clerk for the time being, and the common council for the time being, or the major part of them, shall elect (the common council being a definite body consisting of thirty-six) a majority of the whole number of thirty-six must meet to form an elective assembly, and that if the corporation were so reduced that so many did not remain, no election could be had at all. This rule was recognized in the late case of *The King v. Greet* (b), though from the very special terms of the charter it was held not to govern that case. Assuming, therefore, that the king might by virtue of his prerogative constitute a definite number of persons to be a select vestry to manage the affairs of a parish, and that he had by charter constituted twenty-six persons to be a select vestry to manage the affairs of the district of *St. Matthew, Brixton*, in the language used by the commissioners acting under the authority of the act of parliament, it is quite clear that to constitute a good select vestry capable of doing any act which such a body was authorized to do, it would be essential that there should be present a majority of the number of twenty-

(a) 4 T. R. 810.

(b) 8 B. & C. 305.

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DOE on the Demise of W. WILKINS *against* The
Marquis of CLEVELAND and JOSEPH PARSLEY.

Possession of land for any time less than twenty years by a feoffee is not presumptive evidence of livery of seisin.

An indorsement on the feoffment (purporting to have been made by the attorney thereby appointed to deliver seisin,) that he had done so in the presence of A., is not evidence of that fact, although the deed is produced by the defendant, at the desire of the plaintiff, unless the defendant claims under it.

EJECTMENT. At the trial before *Gaselee J.* at the Spring assizes for the county of *Somerset*, 1829, it appeared that the action was brought to recover a cottage and garden situate in the parish of *Wrington*, in that county. The lessor of the plaintiff was the heir at law of one *John Wilkins*, who died the 24th of *February* 1817. The defendant, the Marquis of *Cleveland*, was lord of the manor of *Wrington*. The land on which the cottage stood, and the garden thereto belonging, was originally part of the waste of the manor. It had been inclosed, and was, forty years ago, in the possession of one *Charles Lovell*, who exercised acts of ownership upon it. He continued in possession until 1812. But by indenture of the 13th *Jan.* 1811, made between him and *John Wilkins*, in consideration of 5*l.* 5*s.* paid to *Lovell* by *John Wilkins*, *Lovell* gave, granted, sold, aliened, enfeoffed, and confirmed to *J. Wilkins*, his heirs and assigns, all that plot, piece, or strip of garden-ground then in the possession of him *Lovell*, and situate in the parish of *Wrington*, in the county of *Somerset*, bounded as therein mentioned, together with all ways, &c., to hold unto and to the use of *J. Wilkins*, his heirs and assigns, for ever. There was a general warranty for title, and a power of attorney from *Lovell* to *Richard Gallop* and *Thomas Gallop* jointly, and either of them severally, to enter into the premises, and deliver seisin. The deed was executed by *Lovell*, and attested by two witnesses. There was a receipt indorsed and signed; and a memorandum, that on the 8th of *February* 1812

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The learned Judge said, that he should leave it to the jury to presume the fact; but in case a verdict should be found for the plaintiff, he would reserve to the defendant leave to move to enter a nonsuit, if the Court of King's Bench should be of opinion there was not evidence from which the jury ought to have presumed livery of seisin. The question was so submitted to the jury, and they found for the plaintiff. A rule nisi for entering a nonsuit having been obtained,

Merewether Serjt. and *Erle* now shewed cause. In *Bac. Abr. tit. Evidence*, 648., it is laid down, "if a deed of feoffment be proved, and the possession have gone along with the deed, there the livery shall be presumed, though it be not proved; for when there has been possession in the manner that the deed sets forth, it founds a very strong presumption, that the possession was delivered in the manner that the deed sets forth; for that there should be a contract to transfer possession, and that possession should go according to that contract, are such concurring circumstances as cannot be accounted for, unless the possession was transferred according to the contract, and, consequently, the livery of seisin must be supposed by the jury." Here the execution of the deed of feoffment was admitted; and it was proved that possession was transferred according to the contract between the parties contained in the feoffment. It was, therefore, properly left to the jury to presume livery of seisin. Besides, the feoffment upon which the memorandum was indorsed that livery of seisin had been made according to the deed was produced by the defendant. It is a rule well established, that if an adverse party who produces a deed takes any
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beneficial interest under it, *Burnett v. Lynch* (a), *Pearce v. Hooper* (b), *Orr v. Morrice* (c), or has recognized it as a valid instrument, *Doe v. Heming* (d), it is unnecessary for the party who calls for the deed to prove its execution. Here the Marquis of *Cleveland* by granting a beneficial lease to the widow of *Wilkins*, in consideration of her giving up the feoffment, has acknowledged it as a valid instrument. He may even thereby be considered to have acquired that interest which *Wilkins* formerly had.

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Bompas Serjt. contrà. It may be conceded that it was competent to the plaintiff to prove livery of seisin by evidence, dehors the instrument. But it ought not to have been left to the jury to presume from the facts proved that livery of seisin had taken place. It is undoubtedly true, that long possession of land is presumptive evidence of title, that is, not only of the existence of the needful instruments of conveyance, but of the observance of all such acts and solemnities as are requisite to make actual assurances valid. But there must be an undisturbed enjoyment of land or of an easement, for twenty years, to constitute this presumptive title. The same length of forbearance unaccounted for in the case of pecuniary demands is presumptive evidence of payment. The same principle must apply to this case. In *Isack v. Clarke* (e), *Coke* C. J. says, "If a deed of feoffment be given in evidence to have been made forty years past, but it cannot be proved that livery was made, yet if possession has all along gone with the deed, this is good evidence to the jury." In *Biden v. Loveday*, cited in *Vernon*, 196., it is said after long pos-

(a) 5 B. & C. 589.

(b) 3 Tawnt. 60.

(c) 3 B. & B. 139.

(d) 6 B. & C. 28.

(e) *Roll. Rep.* 132. pl. 9.

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session, as for *twenty-five* years, livery and seisin shall be presumed. In *Rees v. Lloyd* (a) *McDonald* C. B. was of opinion that it might be presumed after twenty years' enjoyment. In this case only seventeen years have elapsed since the execution of the feoffment, and the premises since September 1825 have been held under a lease granted by the defendant. Secondly, this case does not fall within the principle of the cases which have been cited on the other side, to shew that where a deed called for by one party is produced by another proof of the execution is unnecessary. Here the Marquis of *Cleveland* has never claimed any interest under the feoffment, nor has he ever admitted it to be a valid instrument: on the contrary, he has always disputed its validity. Besides, here it was necessary for the plaintiff to prove not merely the execution of the instrument, but a fact wholly independent, viz. livery of seisin.

LORD ENTERDEN C. J. The lessor of the plaintiff must recover by his own strength. Here he claims as heir at law. He must, therefore, shew a freehold interest in himself or his ancestors. The proper mode would have been to shew that *Lotell* enfeoffed his ancestor. I do not mean to decide, that even if a feoffment and livery of seisin had been duly proved it would have constituted a good title under the circumstances of this case (b). But assuming that it would, in order to make a good title by feoffment there must be livery of seisin. It was proved or admitted in this case that there was a charter of feoffment. The only question is, whether livery of seisin was proved, or could under the circumstances of the case be presumed. The length of

(a) *Wightw.* 123.(b) See *Doe v. Wilkinton*, 3 B. & C. 415. *Doe v. Clarke*, 6 B. & C. 717.

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which it was incumbent on the plaintiff to prove to make out a title. But as those who conducted the plaintiff's case may have supposed that the admission of the feoffment included that of the fact of livery, I think the rule should be made absolute for a new trial only.

BAYLEY J. The indorsement on the feoffment is a mere memorandum that *Gallop* did a particular act. It is, therefore, an assertion by *Chard*, not upon oath, that he saw another party do that act. It was not receivable in evidence. It was probably made to enable *Chard*, at any time afterwards, to call the matter to his recollection, and give positive evidence of the fact of livery of seisin. It was not admissible in evidence, on the ground that the instrument came out of the possession of the adverse party. The defendants do not claim under the feoffment. If the feoffment had the effect of transferring to *Wilkins*, and those claiming under him, the interest in the premises, still, in order to enable the Marquis of *Cleveland* to take any interest under it, there should have been a conveyance to him from the heir at law of *Wilkins*. If the Marquis of *Cleveland* cannot claim any interest under the feoffment, the case does not fall within the principle established by the authorities cited on the part of the plaintiff.

LITLEDALE J. I am of opinion that it was necessary for the plaintiff to prove the fact of livery of seisin in this case. It might have been proved by calling the attorney who made the livery, if he had been alive; or, if he were dead, by calling some other person who was present at the time when livery was made. If there were no such person, other evidence might have been given.

It is said that the possession of the premises by *Wilkins*,

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takes an interest under it, or where he has admitted the instrument to be valid. Here the Marquis of *Cleveland* took no interest under the feoffment, nor has he ever acknowledged it as a valid instrument. Then, there not having been in this case that length of possession which the law considers necessary to constitute presumptive evidence of livery, nor any proof of the fact of livery, the lessor of the plaintiff was not entitled to recover. But as those who conducted his case may have been misled by the terms of the admissions, I think the rule ought to be made absolute for a new trial.

Rule absolute.

The King against The Inhabitants of Bourton-upon-Dunsmore.

A married woman, on binding her son, an illegitimate child, an apprentice, agreed with the intended master, that 10*l.* should be the premium inserted in the indenture, but that he should receive something more.

The husband of the mother of the apprentice paid the 10*l.*, and the mother, without her husband's knowledge, paid the master a further sum

UPON an appeal against an order of two justices, whereby *H. Webb*, his wife and children, were removed from the parish of *Stretton-upon-Dunsmore*, in the county of *Warwick*, to the parish of *Bourton-upon-Dunsmore* in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The appellants (the parish of *Bourton*) admitted a *prima facie* settlement by birth in their parish, and then proved that the pauper had served more than forty days in a third parish under an indenture of apprenticeship, bearing date the 26th of *April* 1813. This indenture, the respondents contended, was void upon the following

evidence.

evidence. The mother of the pauper, who was an illegitimate child, was directed by her husband, who was not the father of the child, to give a premium of 10*l.* and no more. The master required 20*l.* This amount the mother refused to give, but came to a private understanding with the master, that he should receive something in addition to the 10*l.*, but what particular sum did not appear. It was also agreed, that the sum of 10*l.* only should be inserted in the indenture, which was accordingly done. The stepfather paid the premium of 10*l.*, and the mother paid the further sum of two guineas, and a-half. Neither the apprentice nor stepfather was privy to the undertaking above mentioned, and never knew that a greater sum than 10*l.* had been paid, but the master was not aware that the agreement by the mother to give more than the 10*l.* was without the authority or privy of her husband. The indenture bore the proper stamp for any sum not exceeding 30*l.*

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White in support of the order of sessions. The question is, whether the true consideration was stated in the indenture. The statute 8 *Ann. c. 9. s. 39.* (made perpetual by 9 *Ann. c. 21. s. 7.*) enacts, "that all indentures wherein shall not be truly inserted and written the full sum and sums of money received, or in anywise directly or indirectly given, paid, secured, or contracted for, with or in relation to such apprentice, &c. shall be void and not available in any court or place, or to any purpose whatsoever." Here the full sum paid with the apprentice was not inserted in the indenture. It may be said, that the promise to pay something beyond the 10*l.* having been made by a married woman without the consent of her husband was nugatory. But the agree-

ment was afterwards performed. If the master had contracted with the infant alone to receive more than the consideration actually stated in the indenture, and had received it, the indenture would have been void if that sum contracted for was not stated. The onus of stating the true consideration is imposed on the master. He is subject to a penalty for not inserting it. [*Bayley J.* The extra sum not having been paid before the indenture was executed, 10*l.* was the only sum then contracted to be paid, for the promise to pay the extra sum was void.] The agreement was executed afterwards. [*Parke J.* The only question is, what was the full sum received or contracted for, at the time of executing the indenture. The promise to pay the extra sum was a mere honorary engagement.] Such an engagement was a fraud upon the stamp act. [*Parke J.* The stamp act attaches on the specific sum given, paid, secured, or contracted for. As soon as the master executed the indenture, he became bound to take the apprentice. 10*l.* was the only sum given, contracted, or agreed for. Any further sum, the amount of which was not specified, might be paid or not as the parties thought fit.]

Amos, contra, was stopped by the Court.

BAYLEY J. The sum really and bona fide paid and contracted for was inserted in this indenture. There was no binding agreement, for the payment of any sum beyond that amount. The promise made by the feme covert did not bind her.

LITLEDALE J. There was no valid contract by any person to pay more than the sum mentioned in the indenture.

denture. And assuming that the contract by the feme covert to pay a further sum was binding upon her, there was no contract by her to pay any specific sum. So that it was impossible to insert in the indenture the sum to be paid.

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ants of
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upon-
Dunmore.

PARKE J. There was no contract to pay any specific sum beyond that mentioned in the indenture.

Order of sessions quashed.

The KING against The Commissioners of the NENE Outfall.

A RULE had been obtained in this case at the instance of *T. L. Bennett*, clerk, calling upon the defendants as commissioners for putting in execution an act of parliament passed in the 7 & 8 G. 4. for improving the outfall of the river *Nene*, to shew cause why a writ of mandamus should not issue directed to them, commanding them to issue their warrant under their common seal to the sheriff of the county of *Lincoln*, commanding him to return a jury in pursuance of the directions of the said act, to enquire of, assess, and award, and give a verdict for the sum or sums of money

By an act of parliament for improving a navigation, all persons who should be seized, possessed, or interested of or in any lands, tenements, or hereditaments which should be wanted for the purpose of the act, were authorized to contract for and sell the same lands, tenements, or hereditaments, and to convey and assure the same to the commissioners appointed for executing the act; and all such persons were authorized to receive such compensation for the value of such lands, tenements, and hereditaments, or for any damage which should be done thereto in the execution of the works authorized to be made, as should be agreed upon by and between the commissioners and the owners and occupiers; and in case they should not agree, the amount was to be ascertained by the verdict of a jury. By another clause reciting, that for settling all differences that might arise between the commissioners for executing the act and the several persons interested in any lands, tenements, or hereditaments which should or might be taken and affected, or prejudiced for any of the purposes of the act, or by reason of any of the powers thereby granted, the commissioners, in case any such person refused to accept the compensation offered to them, were authorized to summon a jury to award the sum of money to be paid by the commissioners to the parties interested, as a compensation for the purchase of such lands, tenements, or hereditaments. The commissioners having taken for the purpose of the navigation titheable land and covered it with water; it was held, that the tithe owner was not entitled to compensation.

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to be paid by the commissioners to *T. L. Bennett*, as a satisfaction or compensation for the damage done in the execution of the act, to the rectory and vicarage of *Long Sutton* in the said county, or the tithes thereof. Upon shewing cause against the rule, so obtained, the Court ordered it to be enlarged, and directed that, in the mean time, the facts upon which it was to be argued, should be stated for their opinion in the following cases.

By the act of parliament referred to in the rule, certain commissioners for executing the act were incorporated under the name of "The Commissioners of the New Outfall;" and provision was made for the appointment of a committee of the commissioners for executing the act. By the thirty-fourth section of the act it is enacted, that if and when any lands, sands, tenements, buildings or hereditaments shall be wanted for any of the purposes of this act, it shall and may be lawful for all bodies politic, tenants for life, in tail, trustees, executors, and other persons under any legal disability, and for all other persons whatsoever, who shall be seized, possessed, or interested of or in any lands, sands, tenements, buildings, or hereditaments which shall be wanted for any of the purposes aforesaid, and for every or any of them to contract for and sell the same lands, sands, tenements, buildings, or hereditaments, and every or any part thereof; and by indentures of lease and release, or by indenture of bargain and sale enrolled, to convey and assure the same unto the said commissioners for executing this act, and their successors and assigns absolutely, and in fee simple; and that all such contracts, sales, conveyances, and assurances shall be valid, and effectual in law to all intents and purposes whatsoever.

By the thirty-fifth section it is enacted, "That all bodies

bodies corporate or collegiate, corporations aggregate or sole, trustees, or other persons hereinbefore capacitated or authorized to sell and convey any lands, sands, tenements, buildings, or other hereditaments; and all other owners of the same, and all occupiers of any such lands, sands, tenements, buildings, or other hereditaments, or any of them, shall and may accept and receive such compensation or satisfaction for the value of such lands, sands, tenements, buildings, and hereditaments, or for any damage that shall be done thereto in the execution of any of the works by this act authorized to be made or done, as shall be agreed upon by and between the said owners and occupiers respectively for the time being, or other parties interested, or any of them, and the said commissioners for executing this act, or their committee hereinbefore appointed; and the said commissioners by themselves, or their said committee, may and shall be at liberty to enter upon, and thenceforth for ever, to have, take, and enjoy the said lands, tenements, buildings, and hereditaments for the purposes of the said act; and in case the said commissioners, or their said committee, and the said owners, occupiers, or parties interested in such lands, sands, tenements, buildings, or other hereditaments, cannot or do not agree as to the amount or value of such compensation or satisfaction, such amount or value shall be ascertained and settled by a verdict of a jury, as is hereinafter directed."

By the thirty-sixth section of the said act it is enacted, (for settling all differences that may arise between the said commissioners for executing this act, or their said committee, and the several persons interested in any lands, sands, tenements, buildings, or other hereditaments which shall or may be taken, used, affected, or prejudiced for

for any of the purposes of this act, or by reason of the execution of any of the powers hereby granted,) "that if any body politic, &c. or any person or persons so interested as aforesaid, shall refuse to accept such compensation or satisfaction as shall be offered to them by the commissioners, and shall give notice thereof in writing to the commissioners, and the party giving such notice shall therein request that the amount of such compensation or satisfaction, or any matter in difference touching the same may be submitted to the determination of a jury, then it shall be lawful for the commissioners to issue a warrant under their common seal to the sheriff, &c. of the county, in which such lands, &c. shall lie, to summon a jury to enquire, assess, and award, and give a verdict for the sum of money to be paid by the commissioners to the respective parties interested, as a compensation or satisfaction for the purchase of such lands, sands, tenements, buildings, or hereditaments respectively, or for any damage which shall have been done thereto, or to the parties interested therein respectively.

By section 56, a map or plan of the intended new cut or channel, and the lands through which the same was intended to be carried, and also schedules of reference were required to be deposited in certain offices for the inspection of all persons. By section 58, the direction and dimensions of the cut are directed to be in conformity with that map or plan.

The Reverend *Thomas Leigh Bennett*, at whose instance this rule was obtained, was, at the time of passing the act, and still is, lay impropriator of the parish of *Long Sutton*, in the county of *Lincoln*, and also vicar of the same parish, and as such lay impropriator and vicar, entitled to all the tithes, great and small,

of

of the same parish. According to the map or plan, and the schedules of reference alluded to in the act as ascertaining the course of the proposed new cut or channel, that new cut or channel will pass through the titheable lands of the rectory and vicarage of *Long Sutton*, which have hitherto produced corn and grass, and from whence Mr. *Bennett* and his predecessors have been accustomed to take and receive great and small tithes. According to that plan, upwards of 200 acres of such titheable lands will be taken for the purposes of the commissioners, and cut away for the making of the proposed new cut, and the surface destroyed and rendered incapable of bearing corn and grass. Before the application for this rule, the commissioners by their workmen commenced the cutting away of the titheable lands aforesaid, in the direction of the proposed cut, and according to the map or plan; and Mr. *Bennett*, at the request of the parties to whom the tithes were leased, made a reduction of 5s. per acre in the rent at which they were then demised throughout the parish. Upon this, Mr. *Bennett* made to the commissioners a proposal for a certain amount of compensation to be made to him in respect of the premises, which was declined by the commissioners, on the ground that he had an interest only in the produce of the soil, and not in the soil itself; and that they, therefore, were not liable to make any compensation for the loss of the tithes. Mr. *Bennett* has, within the proper time, required the commissioners to summon a jury under the thirty-sixth section of the act to enquire of, assess, award, and give a verdict for a sum of money to be paid by them to him as a compensation or satisfaction for the damage which he will sustain by reason of the pre-
mises,

mises, and has complied with the other requisitions of the act preparatory to such proceeding. The commissioners and their committee have refused to summon a jury, upon the ground that Mr. Bennett is not a party entitled to any compensation within the meaning of the statute. Upon this refusal the present rule was obtained.

Talfourd for the crown. The lay rector is entitled to compensation for the injury which he will sustain by reason of the commissioners having taken, for the purposes of the navigation, the land out of which his tithes was to arise, and thereby rendered incapable of producing tithes. The thirty-fourth section of the act enacts, "that when any lands, sands, tenements, buildings, or hereditaments shall be wanted for any of the purposes of the act, it shall be lawful for all persons interested in the same, to sell and convey them to the commissioners." The thirty-fifth section enables all persons who, by the former section, were authorized to sell and convey any lands, sands, tenements, buildings, or other hereditaments, and all other owners of the same, and all occupiers of any such lands, sands, tenements, buildings, or hereditaments, to receive compensation or satisfaction for such lands, sands, tenements, buildings, and hereditaments, or for any damage that shall be done thereto in execution of any of the works authorized by the act, as shall be agreed upon between them and the commissioners; and in case the commissioners and they shall not agree, the amount of such compensation or satisfaction is to be ascertained by a jury, as directed by the thirty-sixth section. First, the rector is a person interested in an hereditament, within the meaning of that word in the thirty-fourth section; for the tithes is

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make compensation to the rector for the loss he sustains. [Bayley J. In order to entitle the rector to recover damages in an action at law, he must have shewn that he has sustained such damage by reason of the wrongful act of another.]

BAYLEY J. The different provisions of this act of parliament must be construed as if they contained a private agreement between the landowners and commissioners, whereby the former agreed to sell and convey their land to the latter. Now, suppose that there had been such an agreement between a person interested in lands, sands, tenements, buildings, or hereditaments, wanted for the purposes of the act, to sell the same — (those are the words of the thirty-fourth section, which authorize such persons to sell) it is quite clear that the commissioners would acquire, on the completion of the sale, all the rights of the owner of the soil. The thirty-fifth section gives the right to compensation to the persons interested in the lands, tenements, or other hereditaments. The rector or vicar is not interested in the land out of which the tithe arises. When the tithe arises his interest then accrues. The owner of the soil may, if he pleases, use the land in such a manner that it shall not produce tithe, and the rector then can get no tithe. He not having any legal interest in the land out of which the tithe is to arise in point of law, cannot be considered to have sustained any injury by reason of its non-production. He has no right by law to insist upon the land being used in such a manner that it shall produce tithe. That being so, he is not entitled to compensation under this act of parliament.

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PARKE J. The lay rector is not a person contemplated by the thirty-fourth section, because his incorporeal right to tithe is not wanted for the purpose of the act; nor by the thirty-fifth or thirty-sixth sections, because it is not an hereditament within the meaning of those sections. The rector has a mere right to a portion of the produce of the land, when that produce arises and is severed from it. The case is in effect the same; as far as relates to the rector, as if there had been a voluntary conveyance to the commissioners by the landowner, where he does consent, or as if the land had been taken from him where he does not, and had been converted by the commissioners to their purposes by covering it with water. In both cases, the landowner would be entitled to compensation: as also would the owner of such an hereditament as a right of common, or a right of way over the land, for he could maintain an action if the act of parliament had not passed: but the tithe-owner would be entitled to no compensation, for he could not maintain any such action: and the act seems to have intended to provide compensation for those who could have maintained an action for the things done by the commissioners, if they had not had the authority of parliament. The rule for a mandamus must therefore be discharged.

Rule discharged.

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to him to move to enter a verdict. A rule nisi having been obtained for that purpose,

Brougham now shewed cause. This is not a bond within the meaning of the 55 G. 3. c. 184. sched. pt. 1., given as a security for the payment of any sum of money, in part secured by a mortgage or other instrument, bearing even date with such bond; for here the mortgage does not bear the same date with the bond.

J. Williams contra. Coupling that part of the schedule, tit. *Bond*, with the subsequent clause, tit. *Mortgage*, it appears to have been the manifest intention of the legislature, that where different securities for the same sum of money are made at the same time, it should be sufficient if any one of them be impressed with a stamp denoting the payment of the ad valorem duty. Schedule, tit. *Mortgage*, contains a proviso, "that where several distinct deeds or instruments, hereby charged with the said ad valorem duty on mortgages, shall be made at the same time for securing the payment of one and the same sum of money, the said ad valorem duty, if exceeding 2*l.*, shall be charged only on one of such deeds or instruments, and all the rest shall be charged with the duty to which the same may be liable under any more general description of such deeds or instruments contained in this schedule; and if required for the sake of evidence, all the rest of such deeds or instruments shall be also stamped with some particular stamp for denoting the payment of the said ad valorem duty on all the said deeds or instruments being produced, duly stamped with the duties hereby charged thereon." That it was the intention of the legislature to require a stamp,

stamp, testifying the payment of the ad valorem duty, to be impressed on one of the instruments only, appears from the subsequent act of the 3 G. 4. c. 117. s. 3., whereby it is enacted, that if any deed or other instrument, made as an additional security for any sum of money already or previously secured by any bond on which the ad valorem duty charged on bonds by the 55 & 56 G. 3. shall have been paid, such deed or other instrument shall be exempt from the several ad valorem duties charged by the said acts on mortgages, and shall be charged only with the ordinary duty payable on deeds in general; but if any further sum of money shall be added to the principal money already secured, the ad valorem duty shall be charged in respect of such further sum of money. This act shews clearly that the legislature deemed it sufficient, that where the instruments related to one transaction, any one of them should be impressed with a stamp denoting the payment of the ad valorem duty. In this case the different securities were made at the same time, and related to one transaction only.

Lord TENTERDEN C. J. The words "*bearing even date*" in the act of the 55 G. 3. c. 184. schedule, tit. *Bond*, are plain and clear. They tie down the operation of that clause of the schedule to the date written on the instrument. Here the bond does not bear the same date as the instrument on which the stamp denoting the payment of the ad valorem duty is impressed. The bond, therefore, is not within the words of that part of the schedule. But then it is said, that coupling that part of the schedule with a subsequent clause, tit. *Mortgage*, it appears to have been the intention of the

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legislature, that where all the instruments for securing the same sum of money are made at the same time, and any one of them is impressed with a stamp denoting the payment of the ad valorem duty, the other may be received in evidence without having an ad valorem stamp. That part of the schedule, where the words "made at the same time" occur, requires that something more should be done to make the deeds evidence. All the deeds must be taken to the stamp-office, and must have a stamp denoting that the ad valorem duty has been paid on all the deeds. Here that has not been done. The instrument, therefore, was not properly stamped, and the rule for entering a verdict for the plaintiff must be discharged.

BAYLEY and LITTLEDALE Js. concurred.

Rule discharged.

The KING against The Inhabitants of Tipton.

A. being of full age, entered, together with his father, into the following agreement (not under seal), that he would serve B. as an articulated servant for four years, to learn

UPON appeal against an order of two justices, whereby *James Smith*, his wife, and children were removed from the parish of *Birmingham*, in the county of *Warwick*, to the parish of *Tipton*, in the county of *Stafford*; the sessions confirmed the order, subject to the opinion of this Court on the following case:—

his art or trade of a plumber, glazier, and painter, at weekly wages; and it was agreed that A. should be considered an out-apprentice. A. was to do gardening or any other work his master should set him about, and in case A. should be ill, the master should not pay him any wages during the time he should be ill. The master agreed to teach and instruct A. in the art and mystery of a plumber, glazier, and painter. A. served for a year under this contract; the sessions having found that this was a defective contract of apprenticeship, and not a contract of hiring, this Court affirmed their decision.

James

James Smith, the pauper, gained a settlement by hiring and service in the parish of *Tipton*, in the year 1820. About two years afterwards, he entered into the following agreement in writing with *John Tompson*, of *King's Morton*, in the county of *Worcester*. "An agreement made the 4th day of *October* 1822, between *J. Tompson*, of *King's Morton*, in the county of *Worcester*, plumber, glazier, and painter, of the one part, and *James Smith*, aged about twenty-eight years, one of the sons of *Jacob Smith*, of the parish of *Solihull*, in the county of *Warwick*, of the other part. The said *James Smith* and *Jacob Smith* do severally promise and agree that the said *James Smith* shall and will serve the said *J. Tompson* as an *articled servant* for the term of four years, to commence from the 4th of *October* 1822, to learn his art or trade of plumber, glazier, and painter, at the wages of 6s. a week for the first year, and 7s. a week for the second year, 8s. for the third year, and 9s. a week for the fourth year; and it is agreed that the said *James Smith* shall be considered as an *out apprentice*, and the said *James Smith* and *Jacob Smith* shall and will find and provide for the said *James Smith* sufficient meat, drink, washing, lodging, and clothing, and all other necessities during the said term; and the said *James Smith* shall and will do and perform gardening or any other work his master shall set him about during the said term. And in case the said *James Smith* shall be ill and unable to work, or shall absent himself from his master's business, or lose any time during the said term, that the said master shall not pay him any wages during the time he shall be ill or lose any time as aforesaid. And that the said *James Smith* shall and will faithfully serve his said master in all lawful business

during the said term, and shall and will behave himself honestly, orderly, and obediently during the said term, and the said *John Tompson* doth promise and agree that he will *teach and instruct* the said *James Smith* in the art and mystery of a plumber, glazier, and painter, during the said term in the best manner that he can, and that he will pay the wages above set forth to the said *James Smith* during the said term, and the said parties do hereby severally bind themselves for the true and faithful performance of all the agreements above set forth at all times during the said term." This agreement was signed by the parties, and attested by two witnesses, but it was not sealed or stamped. The pauper served *Tompson* under this agreement for more than a year, and boarded and lodged during that time at *Tompson's* house in the parish of *Kings Morton*.

Amos and Hill in support of the order of sessions. The contract in this case was an imperfect contract of apprenticeship, and not a contract of hiring. The parties manifestly appear to have contemplated the relation of master and apprentice. The rule laid down in *Rex v. St. Margaret, King's Lynn* (a), and recognized in *Rex v. Combe* (b), is, that wherever the parties appear to have contemplated the relation of master and apprentice the contract must be deemed to be one of apprenticeship. The question is, What was the paramount and what the subordinate object of the parties to this contract? The paramount object was that the pauper should learn the trade of a plumber. It is true that the master agreed to pay weekly wages; but it is not from that necessarily to be inferred, that the parties

(a) 6 B. & C. 97.

(b) 8 B. & C. 82.

contemplated a contract of hiring, *Rex v. Rainham* (a). Neither are the circumstances that no premium is payable by the contract, or that the pauper was to do all kinds of work, conclusive against the contract being deemed a contract of apprenticeship. The term apprentice, as well as that of artied servant, is used in the agreement. But an apprentice is a servant. Both these words will have effect given to them if this instrument be construed as an imperfect contract of apprenticeship; and the instrument should be so construed as that effect should be given to every word. Every contract of apprenticeship, it is true, contemplates the performance of some service; and in most contracts of hiring it is the intention of the parties that something should be taught; and the question in these cases is, Which is the paramount and which the subordinate purpose? But in this agreement it is expressly stated that the pauper was to serve as an artied servant "to learn the art or trade of a plumber." Besides, the sessions having decided that this was a defective contract of apprenticeship, the Court will not disturb that decision if there are any grounds to warrant it. [*Parks J.* Is it not a question of law, depending entirely on the construction of the agreement?] It depended in some degree on the amount of the wages. The sessions may have thought these too low for a servant, and may thence have been induced to think that it was a defective contract of apprenticeship.

: *Waddington contra.* The contract under which the pauper served was one intended by the parties to create the relation of master and servant, and not that of

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(a) 1 *East*, 531.

master and apprentice. This is very like the case of *Rex v. Coltishall* (a). There the pauper clubbed with one *Rolfe* for three years (which signifies one person's contracting to serve another for the purpose of being taught some art or trade), and also agreed to do any work that *Rolfe* set him about; it was held that the pauper gained a settlement by serving *Rolfe* for a year under this contract. Lord *Kenyon* there said that the stipulation that the pauper was to do any work his master set him about was decisive to shew that he must be considered a hired servant. That case was recognized and acted upon in *Rex v. The Inhabitants of Martham* (b), which is also an authority that this was a contract of hiring and service. Here the pauper was to do gardening or any other work his master should set him about. Here, too, wages were paid, but no premium. In *Rex v. St. Margaret, King's Lynn* (c), and *Rex v. Combe* (d), there were no wages paid. No contract in which the term *servant* has been used, has ever been held to be a contract of apprenticeship. In *Rex v. Rainham* (e) wages were reserved; but in that case it was not necessary to decide whether the contract was one of apprenticeship or of service, because the pauper having served for more than a year, gained a settlement either as an apprentice or a hired servant.

CHRYSTIE, J. said that the case was not a contract of apprenticeship, but a contract of service.

BAXLEY, J. now delivered the judgment of the Court. In this case the pauper entered into an agreement that he would serve one *Thompson* as an article servant for four years, to learn his art or trade of a plumber;

(a) 5 T. R. 193.

(b) 1 East, 239.

(c) 6 B. & C. 97.

(d) 8 B. & C. 82.

(e) 1 East, 531.

at certain weekly wages therein mentioned; and it was agreed that the pauper should be considered an out-apprentice. In this instrument, the character in which the pauper was to act is described both as that of an artied servant and of an apprentice. We must therefore look to the whole of the instrument to learn whether the parties contemplated the relation of master and servant, or that of master and apprentice. Now, first, it is not usual for a father to be a party to a contract whereby his son (of full age) contracts to serve. The fact of the pauper having contracted to do gardening or any other work does not necessarily shew that the parties contemplated a mere hiring. In *Rex v. Combe*, (a) the pauper was to do any other work as well as that of a carpenter, and yet the contract was considered to be an imperfect contract of apprenticeship. So the stipulation to pay wages does not necessarily imply that the parties contemplated the relation of master and servant. Here the master undertook to teach his trade to the pauper. Learning the trade; therefore, was one great object of the parties to the contract. There is a provision in the instrument that if the pauper should be ill, the master should not pay him any wages during the time of his illness. That is not an improper stipulation in a bargain for an apprenticeship; but the law imposes on the master the obligation of providing for a servant during illness. There are some circumstances in this case tending to show that the parties contemplated a contract of apprenticeship, and others that they contemplated a contract of hiring. But, on the whole, as it appears that the main object of the parties was that the pauper should learn the trade of

(a) 8 B. & C. 82.

plumber,

plumber, and as the court of quarter sessions may probably have thought the wages too low for a mere servant, we think that, though the case admits of great doubt, this contract was an imperfect contract of apprenticeship. The order of sessions must, therefore, be confirmed.

Order of sessions confirmed.

The KING *against* The Inhabitants of YARWELL.

Relief given to a pauper not residing in the relieving parish is *prima facie* evidence of his being settled there; but the sessions are not bound upon such evidence only to find that he is settled in the relieving parish; and, therefore, where, upon the trial of an appeal, the pauper proved relief given to him by the appellant parish while resident in another parish, the sessions having quashed the order of removal, this Court refused to disturb the decision.

UPON appeal against an order of two justices, whereby *T. Ireson*, his wife and children, were removed from the parish of *Yarwell* in the county of *Northampton*, to the parish of *Stibbington* in the county of *Huntingdon*; the sessions quashed the order, subject to the opinion of this Court on the following case:—

The respondent proved by the pauper and his wife that the appellants had, about twenty-eight or twenty-nine years ago, and at three or four times subsequently, the last time being ten years ago, relieved the pauper and his family while they were residing in the respondent parish. When they wanted relief, they applied to the parish officers of the appellant parish for work, and as they could not find it for them, they allowed the family 12s. a week. It was the pauper's wife who applied for relief upon all those occasions except one, when the application was made by the pauper himself. He had been once examined by the appellants, and stated that he had been an apprentice in their parish. The appellants also, within the last six years, and while the pauper was resident in the respondent parish, paid the expenses of his wife's confinement in a lunatic asylum at *Peterborough*.

Campbell



PARKE J. If the sessions intended to ask us whether there was *prima facie* evidence of a settlement in the appellant parish, I should have answered that there was, and that they ought to have acted upon it. If they asked me whether they were bound to do so, I should answer they were not.

Order of sessions confirmed.

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Reg. The Inhabit. of Yarwell v. D.B. 1829

THE KING AGAINST SAINT JOHN, DEVIZES.

A pauper hired herself to A. B., to work in his factory for four years, at weekly wages. There was a stipulation in the agreement, that the pauper should observe and obey all the rules and regulations of the factory, as well with regard to the hours of attendance and of work as the mode and other particulars of working. The pauper was told she must work twelve hours a day; but the rules of the factory were occasionally varied by the master: Held, that this was not an exception in the contract of hiring, and that a settlement was gained by service under it.

UPON an appeal against an order for the removal of *Prudence Abrahams* from *Chippenham* to *Devizes*; the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The pauper being at the time settled in *Saint John Devizes*, on *February 6th 1826*, was hired by the foreman of one *Spiers* under the following agreement, which was signed by the parties named in it:—“*Prudence Abrahams* of *Brumham*, in the county of *Wilts*, silk winder or weaver, with the consent and approbation of her father *Robert Abrahams*, hereby hires herself to *Mr. Joseph Spiers* of *Chippenham*, to work in his factory as silk winder or weaver for four years from this day. And *Mr. J. Spiers* agrees to pay for the services of the said *Prudence Abrahams* 2s. a week for the first year, 3s. per week for the second year, 4s. per week for the third year, 5s. per week for the fourth year, and 5s. per week for the fifth year, subject to a proportionate reduction being made for loss of time occasioned by sickness, or her being otherwise absent from work. And it is hereby agreed that the said *Prudence Abrahams* shall

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in all things observe and obey all the rules and regulations of the said Mr. J. Spiers, as well with regard to the hours of attendance and of work, as the mode and other particulars of working; and shall in all things whatsoever conduct herself faithfully, honestly, and diligently, in her said engagement; and as a good servant ought to do. It is also agreed that in case the said *Prudence Abrahams* shall unnecessarily waste or otherwise lose, destroy, or make away with the silk entrusted to her, that she shall pay such reasonable compensation to *Spiers* as his superintendent shall appoint. If at the expiration of the above period the said *Prudence Abrahams* shall have behaved well, shall have done her work well, and shall in every respect have duly performed this engagement, but not otherwise, Mr. J. Spiers promises to give the said *Prudence Abrahams* the sum of 3*l.* as a gratuity and reward for her good conduct, over and above the weekly wages above specified, subject nevertheless to any deduction which may have accrued in the respect of absence by reason of sickness or otherwise above mentioned." When the pauper executed the agreement, the foreman told her that she must observe the working hours, and if certain work was not done, must work twelve hours a day. The pauper entered on her service the day she executed the agreement. Rules for the factory had not at that time been reduced to writing. The foreman said they existed only in the breast of the master, but were known to and acted on by the work-people. They were during the service of the pauper occasionally altered in some respects by the master alone; but the foreman stated that the rule as to the hours of work was never changed. Time, however, was at first allowed for tea,

which

which allowance was afterwards revoked by the master's sole authority. Under this hiring, the pauper served a year in *Chippenharn*, and becoming afterwards chargeable, was removed to *St. John's Devices*; which removal was the subject of the appeal.

The question was, whether this was an exceptive hiring, and whether the parol evidence had been properly received.

Bingham and *Follett* in support of the order of sessions. This hiring was an exceptive hiring, even without calling in aid the parol evidence. It is sufficient if the intention to except appears clearly in the contract, *Rex v. North Nibley* (a). It is expressly stipulated that the pauper shall obey the regulations of the factory with regard to the hours of attendance. That shews clearly she was not to be under the master's control at all hours, for otherwise it was unnecessary to mention hours of attendance. They are never mentioned in hiring a domestic or agricultural servant. They are hired for the year, quarter, or month, without reference to hours. The expression "hours of attendance," *ex vi. termini*, imports that there were to be hours of non-attendance. If she observed the hours of attendance, the master could not compel her to work during the hours of non-attendance. In *Rex v. Byker* (b), where the hiring was held not to be exceptive, the pauper was hired at 1s. 10d. per day for every good day's work not exceeding fourteen hours; and 2d. more per day when that time was exceeded: but there the time was only mentioned as the measure of the wages. Secondly, the

(a) 5 T. R. 21.

(b) 2 B. & C. 114.

parol evidence was receivable. The regulations being referred to in the agreement, are part of the contract. As they were not, and need not be in writing, they could only be ascertained by parol testimony. Parol evidence, indeed, is not admissible to vary or add to a contract in writing, but here the parol evidence does not add to or vary the contract; it is by reference incorporated in the contract. The agreement without it is incomplete. What is said at the time of making a contract, is often necessarily a part of the contract; as where an instrument would have one effect if delivered as an escrow, another if delivered as a deed. Evidence that the party said he delivered it as an escrow, is admissible. In *Rex v. Landon (a)*, in order to ascertain whether a written contract to learn a business was a contract for service or for apprenticeship, the Court admitted parol evidence that the person who learned the business agreed to give a premium.

Merewether Serjt. (and *Audry* was with him) contrd; was stopped by the Court.

BAYLEY J. Where there is in a contract of hiring, an express exception of any particular time, so that during that time the master cannot exercise any control over the servant, that is not a hiring for a year, and a settlement cannot be gained by service under it. We must look to the terms of the contract to learn what the bargain was in this case. By the agreement, the servant stipulates to obey all the rules of the factory with regard

(a) 8 T. R. 379.

1829.

**The King
against
SAINT JOHN,
DEVEES.**

to the hours of attendance. In every contract of hiring, the law will imply that the party hired shall work at all reasonable hours when required. Generally speaking, the ordinary working hours in a manufactory are twelve hours per day; but it does not therefore follow that the master may not on extraordinary occasions require his servants to work at other hours; and whether he does so or not, the relation of master and servant continues during the whole day. It does not appear by this case, what the specific rules and regulations were as to hours of work. But assuming that one of them was, that the servant was to work twelve hours per day; yet inasmuch as the regulations might be, and were, from time to time altered by the master, the stipulation that the servant should obey the rules and regulations of the factory with regard to hours of work, did not give the servant any right to say that the master should not require her services at all reasonable hours. Such a stipulation does not necessarily imply that she is not to work beyond certain hours. The true meaning of this agreement is, that the relation of master and servant was to continue the whole day. There is no express exception in the contract, and no remission of service but such as the law will imply in every contract of hiring. The order of sessions must therefore be quashed.

LITLEDALE J. To constitute a yearly hiring, the relation of master and servant must subsist during the whole year, and during the whole of every day in the year. It has been held in several cases, that a hiring in terms for a year, the servant to work for so many hours a day, is an exceptive hiring. Those cases have gone

to

to a great extent. It seems to me that in terms of such a contract there is an evidence shewing that the relation of master and servant was to subsist during the whole year, or during every day in the year for which the contract was made; it is a yearly hiring. By the contract the servant was to conform herself to the regulations of the factory. That is a contract which the law would imply in every contract of hiring. We cannot from that infer that there was any period of time, during which the master and servant was not to exist.

PARKE J. I have no doubt that a contract passed by parol between the foreman and the servant was not admissible evidence to explain the contract. It is said that there is an exception to the rule, by reason of that stipulation, where the servant agreed to obey the rules and regulations of the factory. But that imports no more than a contract to obey the orders of her master, which is a term in every contract of hiring.

Order of settlement.

Cocks and Others *against* MASTERMAN and Others.

A bill, purporting to have been accepted by *A.*, was presented for payment to his bankers on the day when it became due. The latter, believing it to be the genuine acceptance of *A.*, paid the amount but on the following day having discovered that the acceptance was a forgery, they gave notice of that fact to the party to whom they had paid the bill, and required him to return the money: Held, that the holder of the bill is entitled to know, on the day when it becomes due, whether it is honored or dishonored; and that, no notice of the forgery having been given on the day the bill became due, the parties who had paid the money were not entitled to recover it back.

ASSUMPSIT for money paid, had, and received, &c.

Plea, non assumpsit. At the trial before Lord *Tenterden* C. J. at the *London* sittings after *Michaelmas* term 1827, a special verdict was found, stating in substance as follows:—Long before, and at the several times hereinafter mentioned, the plaintiffs carried on business as bankers at *Charing Cross*, in the city of *Westminster*, and the defendants carried on business as bankers in *Nicholas Lane*, in the city of *London*. Before and on and after the 24th of *May* 1827, certain persons carrying on trade and business under the firm and style of *Sewell and Cross*, kept an account and cash with the plaintiffs as their bankers; and certain other persons carrying on trade and business under the firm and style of *Sanderson and Co.*, kept an account and cash with the defendants, as their bankers; and before the said 24th of *May* a bill of exchange, drawn by one *T. Dutton*, upon *Sewell and Cross*, bearing date the 21st of *March* 1827, for 198*l.* 19*s.*, payable two months after date to the order of *T. Dutton*, and indorsed by the said *T. Dutton*, and also by *C. Heginbotham* and one *J. Harris*, and purporting to be accepted by *Sewell and Cross*, payable at the plaintiffs', was paid to the defendants by *Sanderson and Co.* to their credit with the defendants; and upon the said 24th of *May* the defendants presented the said bill to the plaintiffs, and required them to pay the same according to the said acceptance, and that

that the plaintiffs, believing the acceptance to be that of *Sewell and Cross*, paid to the defendants the sum of 198*l.* 19*s.* as the amount of the bill of exchange so purporting to be accepted as aforesaid; that on the 25th day of *May* (being the day next following the day on which such payment was made) the plaintiffs discovered that the acceptance on the bill was not the acceptance of *Sewell and Cross*, but that the same was forged by *T. Dutton*, the drawer of such bill; that the said acceptance was in fact so forged; and that on the said 25th of *May*, about one o'clock, the plaintiffs gave notice to the defendants and to *J. Harris*, the indorser, and to *Sanderson and Co.*, that the same was so forged; and that the said payment had been made by them under a mistake, and in ignorance of the acceptance being so forged, and they requested the defendants to repay them the said sum of 198*l.* 19*s.*; and on the same day one *Thomas Gates*, as attorney for the Bankers' Society for Protection against Forgers, and of which society the plaintiffs and defendants were members, sent the following letter to *C. Heginbotham*, the other indorser, and also a like one to *J. Harris*:—"Sir, a bill of exchange, bearing your indorsement for 198*l.* 19*s.*, drawn by *Thomas Dutton*, and purporting to be accepted by *Sewell and Cross*, and indorsed by you to *J. Harris*, due yesterday, has been refused payment, and now lies with me, the acceptance being forged; and if the same is not taken up by ten o'clock to-morrow, legal proceedings will be taken against all parties." The sum of 198*l.* 19*s.* was entered by the plaintiffs in the day-book, to the debit of *Sewell and Cross*, but was not carried into the ledger or further charged to their account; *Sanderson and Co.* did not

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COCKS
against
MASTERMAN.

draw out of the hands of the defendants any sum of money upon the credit of or in respect of the said bill, and the balance of monies belonging to *Sanderson* and Co., in the hands of the defendants as their bankers, both before and at and after the several days before mentioned, greatly exceeded the said sum of 198*l.* 19*s.* The case was now argued by

R. V. Richards for the plaintiff. The money in this case was paid by the plaintiffs to the defendants without consideration, and under a mistake as to the facts; it may therefore be recovered back in this action. On the other side, the cases of *Price v. Neal* (a) and *Smith v. Mercer* (b) will be relied on. The first was an action by the drawee of two bills to recover back the amount which he paid to the holder; one of the bills he had previously accepted, the other he had not, but both were paid by him when at maturity. Now the drawee, by accepting, precludes himself from disputing the handwriting of the drawer, and the effect of payment by the drawee must be the same; the Court, therefore, in that case, properly decided that the plaintiff could not recover. Here the question is very different; being between agents of the holder and drawee, and not between the parties themselves. In *Smith and Others v. Mercer* (b), the plaintiffs (who were the bankers of *Evans* whose acceptance had been forged) paid the bill when due, to the defendant's agent, and did not discover the forgery for seven days when notice was given. *Chambre J.* held that the money might be recovered back; the rest of the Court were of a different opinion; but

(a) 1 *W. Bl.* 390. 3 *Burr.* 1354.

(b) 6 *Trent.* 76.

2



the prior holder, nor could the latter have sued the then defendant. *Wilkinson v. Johnson* (a) also very closely resembles this case. There a bill dishonored by the acceptor was presented to the agent of a supposed indorser, who paid it for the honor of that person. The indorsement proved to be a forgery, and the agent was allowed to recover back the money so paid. The Court held, that the plaintiff was deceived by the presentment of the bill to him as the agent of the supposed indorser; so here the plaintiffs were deceived by the presentment of the bill to them as the bankers of the supposed acceptor. Nothing was done in this case that could prejudice any of the parties; when the forgery was discovered, the holder of the bill had not drawn out any of the money from the hands of the defendants, and none of the prior parties to the bill were discharged by laches. Unless then it be held that if the forgery had been discovered immediately after the payment, the money could not have been recovered back; the present plaintiffs must be entitled to recover in this action.

Pollock contra. The defendants are entitled to retain the money which they received for their customer. The case presents two conflicting principles: first, that money paid under a mistake may be recovered back; secondly, that the acceptance or payment of a bill cannot be revoked; and the question is, by which of these principles the present case is to be governed. The first has been applied with this limitation, that where the party paying has knowledge of all the facts or the means of knowledge, he cannot recover back the money paid.

(a) 5 B. & C. 428.

Here the plaintiffs had the means of knowing their customer's handwriting, it was their duty to know it, and, therefore they cannot recover back the money on the ground that they paid it under a mistaken supposition that the bill was accepted by their customer. If, indeed, the mistake had been discovered immediately, the transaction might have been undone, for then no new circumstances varying the situation of the parties could have intervened. *Here a whole day intervened, new circumstances might have arisen, and the Court will not enquire whether they did or not.* *Smith v. Mercer (a)* is directly in point for the defendants, and *Wilkinson v. Johnson (b)*, cited for the plaintiff, differs, for there the mistake was discovered *on the same morning* when the payment was made. [*Bayley J.* There too the bill was taken to the plaintiffs', and presented to them as a bill bearing the genuine indorsement of *Heywood and Co.*]

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Cocks
against
Mawman.

Richards in reply. The whole of the argument for the defendants rests on the ground that the banker is bound to know his customer's handwriting; but that ground existed equally in *Wilkinson v. Johnson (b)*, and was held insufficient to defeat the plaintiff's claim. Unless the mistake as to the fact can be attributed to the laches of the party paying, he is entitled to have his money returned. *Milner v. Duncan (c)*.

Cur. adv. vult.

BAYLEY J. now delivered the judgment of the Court. This was an action brought by *Cocks and Co.* bankers in *London*, to recover a sum of money paid by them to

(a) 6 Taunt. 76.

(b) 5 B. & C. 428.

(c) 6 B. & C. 671.

the defendants, on the ground that they, having paid the money, in mistake and ignorance of the facts, were entitled to recover it back. The bill was presented the 24th of May, the day on which it became due. The plaintiffs paid it, not knowing that it was not the genuine acceptance of *Sewell and Cross*. On the following day it was discovered that the acceptance was a forgery, and the plaintiffs on that day gave notice to the defendants. It was insisted that the plaintiffs were not entitled to recover, because they, being bankers, ought, before they paid the bill, to have satisfied themselves that the acceptance was genuine. On the other hand it was said that the plaintiffs, having given notice of the forgery to the defendants on the day next after the bill had been paid, were entitled to recover back the money, on the ground that they had paid the money under a mistaken supposition that the acceptance was the genuine acceptance of *Sewell and Cross*, and the case of *Wilkinson v. Johnson* (a) was relied on. That case differs from the present in one material point, viz. that the notice of the forgery was given on the very day when payment was made, and so as to enable the defendant to send notice of the dishonour to the prior parties on that day. In this case we give no opinion upon the point, whether the plaintiffs would have been entitled to recover if notice of the forgery had been given to the defendants on the very day on which the bill was paid, so as to enable the defendants on that day to have sent notice to other parties on the bill. But we are all of opinion that the holder of a bill is entitled to know, on the day when it becomes due,

(a) 3 B. & C. 428.

whether it is an honoured or dishonoured bill, and that, if he receive the money and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back. The holder, indeed, is not bound by law (if the bill be dishonoured by the acceptor) to take any steps against the other parties to the bill till the day after it is dishonoured. But he is entitled so to do, if he thinks fit, and the parties who pay the bill ought not by their negligence to deprive the holder of any right or privilege. If we were to hold that the plaintiffs were entitled to recover, it would be in effect saying that the plaintiffs might deprive the holder of a bill of his right to take steps against the parties to the bill on the day when it becomes due.

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COCES
against
MASTERMAN.

Judgment for the defendants.

Only. James is not a bill 209

PIKE *against* EYRE and Others.

TRESPASS for breaking and entering a shop in the county of Oxford. Plea, that one *Stopes* being seised in his demesne as of fee of the shop, before the committing of the alleged trespass, to wit, on the 26th of July 1826, demised it to *Hewett*, one of the defendants, to hold from year to year so long as they should respectively please, by virtue whereof *Hewett* entered, and was possessed of the premises as tenant to *Stopes*; and that plaintiff, claiming title under colour of a pretended charter of demise, entered, &c. Replication, that before the trespass, and while *Hewett* was possessed as aforesaid, to wit, on the 25th of December 1826,

A demise by a tenant from year to year to another, also to hold from year to year, is, in legal operation, a demise from year to year during the continuance of the original demise to the intermediate landlord, and is properly so described in pleading, although at the time of making the contract no such qualification is mentioned.

Hewett

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against
EVAN.

Hewett demised the premises to the plaintiff, "to have and to hold the same to the plaintiff for one whole year from thence next ensuing, and fully to be complete and ended, and so from year to year as long as they the defendant and the said *Hewett* should respectively please, during the continuance of the said demise thereof to *Hewett* from *Stopes*," by virtue whereof, the plaintiff entered, and was possessed at the time of the trespass. Rejoinder, taking issue on the demise, *modo et forma*, and concluding to the country. At the trial before *Parke, J.*, at the *Oxford* Summer assizes 1828, evidence was adduced of a demise by *Hewett* to the plaintiff to hold the premises from year to year generally, but it did not appear that such demise was qualified by any reference to the duration of *Hewett's* interest, or that the nature of that interest was mentioned. It was objected by the counsel for the defendants, that the proof did not support the allegation on two grounds, first, that the plaintiff was bound to shew that the qualification which he had introduced as limiting the duration of his tenancy to that of *Hewett's* interest, was expressed as part of the contract between *Hewett* and himself; secondly, that if the replication must be taken as describing not the actual contract between the parties, but its legal effect with reference to that which was not mentioned, the legal effect was not truly stated. The jury, under the learned Judge's direction, found a verdict for the plaintiff, but liberty was given to the defendants to move to enter a nonsuit. In *Michaelmas* term following, *Jervis* moved accordingly on both points; and as to the second, cited *Pleasant v. Benson (a)*. The Court,

(a) 14 *East*, 284.

being

being clearly of opinion that the replication purported to contain a statement of the legal effect of the demise and not of the actual bargain between the parties, refused to disturb the verdict on the first ground, but granted a rule on the second point, viz. whether the legal effect of the demise was stated correctly.

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 FIVE
 AGAINST
 EYRE.

Peake Serjt. and *Talfourd* now shewed cause. The demise is correctly stated, according to its legal effect, inasmuch as *Hewett* could only demise during the continuance of his own interest, and therefore the demise is properly qualified by reference to that interest. *Pleasant v. Benson* (a) was relied on when the rule was obtained, to shew that the tenancy of the plaintiff might subsist beyond that of *Hewett*, in the event of *Hewett* surrendering his term to his own landlord during that of his tenant; but if the case be applicable at all, it rather proves the reverse. In that case *Wilkes*, being tenant from year to year to *Hayton*, underlet part of the premises to *Benson*, and pending that subtenancy gave up to his landlord the part which he had retained in his own possession, without either giving notice to *Benson* to quit or surrendering part in the name of the whole, on which it was holden that *Hayton* could not sustain ejectment against *Benson* upon a notice to quit in his own name, as the tenancy of *Benson* to *Wilkes* still subsisted. In that case there had been no surrender of that part of the premises by the intermediate landlord. But supposing the opinion of the Court to be, that notwithstanding such surrender the subtenancy would remain undetermined, it does not follow

(a) 14 *East*, 234.

that

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Prize
against
Error.

that the sub-tenancy would subsist beyond that of the intermediate landlord, but that the interest of the intermediate landlord would remain, notwithstanding the surrender, to support such tenancy. The use to be made of that case, therefore, consists in a mere verbal fallacy; properly considered, it shews that the demise in the replication is correctly stated; for, supposing *Hewett's* tenancy determined by *Stopes*, by a regular notice to quit, that of the plaintiff would be determined also; while, on the other hand, a surrender by *Hewett* would not operate to the prejudice of the plaintiff's tenancy, as *Hewett's* term would still subsist for the purpose of sustaining it. In case of such abortive surrender, the plaintiff would still be tenant, not to *Stopes* but to *Hewett*, who alone could distrain; and in every way, therefore, of considering the subject, the demise on which the plaintiff relies was a demise during the continuance of *Hewett's* interest, and during that interest only.

Jervis and Follett contra. The demise proved essentially varied from that laid, inasmuch as the legal incidents of a demise from year to year, and of a demise from year to year during the continuance of another demise, differ. Thus a demise from year to year made generally would continue, notwithstanding the surrender of the term by the party so demising (a), *Doe v. Pyke* (b). Again, a demise from year to year might have continuance beyond the existing demise, in case the interest of the termor should merge in some greater interest, as if he became the purchaser of the fee. Suppose tenant

(a) *Co. Litt.* 338 b.(b) 5 *M. & S.* 146.

for life should make a lease for twenty-one years, would that be properly described in pleading as a lease for twenty-one years, determinable at the death of the lessor? At all events, the terms of the demise, as stated, imply a power reserved by *Hewett* to determine the demise at any time he might see fit, by determining his own tenancy; and, if this be the meaning, it cannot be supported by proof of a general demise, in which no reference was made to any superior tenancy.

1829.

 PIKE
 against
 ESTE.
Cur. adv. vult.

BAYLEY J. now delivered the judgment of the Court. The only question in this case, is, whether the averment in the replication, on which issue was taken, was supported by the evidence. The averment was, that whilst *Hewett* was possessed, under the demise made to him by *Stopes*, he demised to the plaintiff to hold for one year, &c., and so from year to year, “during the continuance of the said demise thereof to *Hewett* from *Stopes*.” The evidence was of a letting by *Hewett* to the plaintiff from year to year generally. We think the replication does not mean to describe the actual contract of the parties; but the estate which passed by virtue of the alleged demise, and that it intends to plead (as it ought to do) (a) the demise according to its legal effect.

The question, then, is, whether this was the legal effect of the general demise by *Hewett*. It is not necessary to decide whether the replication is to be taken to state all the interest that passed; for, assuming that it is, we think it does correctly state it. It is said that it

(a) *Com. Dig. Pleading (C)*, 45.

does

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 against
 ESTATE

does not, because the incidents to or qualities of a term from year to year, granted by a termor from year to year, *generally*, are different from those of a term granted by him *during the continuance* of the demise to him.

But we think there is no misdescription of the incidents or qualities of this demise. First, it is said, that the term from year to year granted to the under lessee, generally, would continue though the lessee surrendered his term or merged it; that is, it would continue longer *than during the continuance* of the demise to the lessee: not so a demise made during the continuance of the first demise. For this, *Co. Litt.* 358. was cited; but the authority gives an answer to the objection, for it shews that, "in regard to strangers, not parties or privies to the surrender, the estate surrendered hath, *in consideration of law, a continuance.*" Therefore, although *Hewett* might have surrendered, his estate would, as to *Pike*, have continuance. In both cases, the demise by *Hewett* would continue during the continuance, in legal effect, of his term, and no longer.

Secondly, it is said, that a term granted generally would have continuance after the expiration of the first tenancy by effluxion of time, if he had before then purchased the fee, but not so a term granted *during the continuance of his tenancy*. The answer is, that it would be good by estoppel only, and this is not a demise by indenture, which is essential to an estoppel.

Thirdly, another objection is taken, from a supposed analogy to leases by tenants for life. There is, however, none. Such estates are, in contemplation of law, of longer duration than estates for years; and an interest

for

for years, however long, passes from a grantor seized for life.

The last objection is, that the terms used in the replication, that *Hewett* demise "to hold during the continuance of his own demise," properly describe a demise in which he reserves to himself the power of determining his own estate when he pleases, by surrender; but that the proof was of a demise in which no such power was reserved. But we think the terms used in the record meant during the *continuance* of the demise to *Hewett*, from year to year *in its ordinary course*.

For these reasons, we are of opinion, that the replication properly describes the legal effect of the letting, which was proved on the trial. The rule for entering a nonsuit must, therefore, be discharged.

Rule discharged.

The KING, on the Prosecution of the Inhabitants of the Parish of COTTINGHAM, in the County of NORTHAMPTON, *against* Sir RICHARD BROOKE DE CAPEL BROOKE, Bart.

THE defendant having appealed against a rate for the relief of the poor of the parish of *Cottingham*, in the county of *Northampton*, for certain saleable underwoods in that parish, the sessions confirmed the rate, subject to the opinion of this Court on the following case:—

There are 140 acres of land, called *Lord Sondes' Park*, within the parish of *Cottingham*, in respect of which no person is rated. The park is in the occupation of Mr. *Peach*, as tenant to Lord *Sondes*. Evidence was offered, on the part of the defendant, to prove

that,

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PIKE
against
BYAR.

Where there is an appeal against a poor-rate, on the ground that some person is omitted who ought to be rated, the justices at sessions cannot hear the appeal, unless notice of the appeal, and the ground of it, has been given to the party said to have been improperly omitted.

1829.

—
The KING
against
BROOKS.

that, at the time the rate was made, this land was profitably occupied, for the purpose of calling upon the Court to quash the rate, on the ground that no person was rated in respect of it. The evidence was objected to on the part of the parish of *Cottingham*, as it had not been proved that notice of appeal had been served on Mr. *Peach* or Lord *Sondes*. The question for the opinion of this Court was, whether or not the evidence ought to have been admitted.

Denman (with whom was *Humfrey*) in support of the order of sessions, was stopped by the Court.

Miller contra. It appears that in this case there was a large tract of land rateable. [*Bayley* J. The Court cannot tell that it was rateable. The question is, whether you had a right to go into your case and prove it rateable.] We had a right to go into the case, although notice of the ground of appeal had not been given to the party occupying the land. Such notice is only necessary where the object of the appeal is to amend the rate by inserting the names of some persons who have been omitted. The 41 G. 3. c. 23. s. 6. provides that the sessions shall not on appeal amend a rate, by inserting the names of any parties to whom notice has not been given, because that would be an act of injustice towards those parties. But the omission makes the rate bad, and it may be quashed, and when a new rate is made, all parties to be affected by it will have notice, *Rex v. Aberavon*. (a)

(a) 5 East, 455.

BAYLEY J. It seems to me that the case of *Rex v. Aberdon* furnishes an argument in support of the order of sessions in the present case. There notice of appeal was given to the corporation at large, on the ground that certain land said to be occupied by them was not rated; on the other side it was contended, that the corporation did not occupy, but that there was an actual occupation by certain burgesses, and the widows of burgesses, and the question was raised, whether the Court could quash or amend the rate in the absence of notice to them. Lord *Ellenborough* says, "The case is very loosely and inaccurately drawn. We ought to have the right of enjoyment more distinctly stated. It does not appear whether the burgesses who turned stock on the common did so in right of their franchise, or by permission of the corporate body," and the Court were about to send the case back to the sessions to be restated, in order to see whether the burgesses were the occupiers or not; which clearly must have been upon the principle that the occupiers ought to have had notice of the appeal. Then Lord *Ellenborough* says, "I think we may deal with the case as it is. Here is a large track of property producing profit, which is liable to be rated, and no person is in fact rated for it. This property is stated to belong to the corporation, and it may be doubtful whether the occupation shewn be their occupation or that of individuals. Under such circumstances I cannot say that the sessions have done wrong in quashing the rate." Before the 17 G. 2. c. 38. was passed, whenever a party had been improperly omitted out of a rate, the court of quarter sessions were bound to quash it. That statute was passed to remedy that inconvenience, but then it was thought unjust that a party

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The King
against
Bacon.

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—
The King
against
Brooke.

should be affected by having his name inserted in a rate without notice, and the 41 G. 3. c. 23. was passed to remedy this evil. The preamble of the statute recites, that by the 17 G. 2. c. 38. power was given to the justices, upon appeals from rates and assessments, where they should see just cause, to give relief, to amend the same in such manner only as should be necessary for giving such relief without altering the rate in other respects. But if the argument of Mr. *Miller* were to prevail, the sessions would no longer have the option of amending rates; they might in all cases of omission be compelled to quash them, and so appeals would be doubled in number. The sixth section of the act, however, is general, and applies equally to all cases either of amending or quashing rates. It provides, in plain unequivocal terms, that if there is an appeal against a rate because some person who ought to have been rated has been omitted, notice shall be given to such person, and if it be not given the appeal shall not be heard. I am, therefore, of opinion that the course taken by the justices at sessions in this instance was right, and that their order must be confirmed.

LITLEDALE and PARKE Js. concurred.

Order of sessions confirmed.

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ANNANDALE *against* PATTISON.

THIS was an action of debt on a bond, whereby the defendant was bound to the plaintiff in the penal sum of 6000*l*. The defendant set out on over the bond and condition; which (after reciting that by a bond, bearing date the day of 1826, in the *Scotch* form, proceeding upon the narrative therein mentioned, *W-Gracie* as principal, and the plaintiff as cautioner, surety, and full debtor, for and with him, bound themselves co-jointly and severally, &c., to make payment to each and all the just and lawful creditors of *Archibald Allardice* and Co., printers and booksellers in *Edinburgh*, as a company, and of *Archibald Allardice* and *John Maitland* as individual partners thereof, at the date of awarding the sequestration of their estates in the said bond mentioned, excepting however from the obligation, all private or personal debts due by the said *Archibald Allardice* and *J. Maitland*, the sum of 14*s*. in the pound of their respective debts, due to the said creditors at and prior to the date of the said sequestration, &c.) was to indemnify the plaintiff against loss, by reason of his having become bound with *Gracie* in the manner recited, and pleaded

Where by bond *A.*, as principal, and *B.*, as surety, were jointly and severally bound to pay to the creditors of *C.* 14*s*. in the pound on the amount of their debts, and by the same bond *A.* was bound to indemnify *B.* against all loss by reason of his becoming surety: Held, that a stamp of 1*l*. 15*s*. was sufficient in amount for this instrument, and that it did not require a second stamp on account of *A.*'s obligation to indemnify *B.*, the whole being one transaction.

First, Non est factum.

Second, That the plaintiff had not, nor had his lands or tenements, goods or chattels, or any or either of them, or any part thereof, at any time since the making of the said supposed writing-obligatory, been in any wise damaged by reason or means of any cause, matter,

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or thing, in the condition of the said writing-obligatory mentioned.

Issue was joined on the first plea.

To the second the plaintiff replied, that after the making of the writing-obligatory in the declaration mentioned, to wit, on the 5th of *April* 1827, and on divers other days and times, &c., the plaintiff, by reason of his having become bound as in the said condition of the said writing-obligatory mentioned, was forced and obliged to and did then and there necessarily make payment to divers persons, being the just and lawful creditors of the said *Archibald Allardice* and Co., printers and booksellers in *Edinburgh*, as a company, and of *Archibald Allardice* and *John Maitland* as individual partners thereof, *at the date of awarding the sequestration of their estates mentioned in the said bond in the said condition of the said writing-obligatory mentioned*, divers large sums of money, amounting together to a large sum of money, to wit, the sum of 1500*l.*, being payments by the said plaintiff in respect of the instalments due in respect of the sum of 14*s.* in the pound on the respective debts of the said creditors, due to them at and prior to the date of the said sequestration in the said condition of the said writing-obligatory mentioned, (the said debts not being private or personal debts due by the said *Archibald Allardice* and *John Maitland*) according to the form and effect of the said condition of the said writing-obligatory, and of the said bond, therein mentioned.

And the said plaintiff hath also, by reason of the said plaintiff having become bound as in the said condition mentioned, paid and become liable to pay divers costs, charges, and expenses, in and about the said payment
and

and execution of the said purposes of the said bond in the said condition mentioned, amounting to a large sum of money, to wit, the sum of 300*l.*, making, together with the said sum so paid as aforesaid, in the whole a large sum of money, to wit, the sum of 1800*l.*; whereof the defendant *W. Gracie*, &c., afterwards, to wit, on the 1st of *November* 1827, had notice. Yet neither defendant nor *Gracie* kept harmless and indemnified the plaintiff of and from the same sums of money.

Rejoinder. That the plaintiff hath not by reason of his having become bound, as in the said condition of the said writing-obligatory mentioned, been damnified in manner and form, as the plaintiff hath in his said replication alleged.

At the trial before *Bayley J.* at the Spring assizes for the county of *Northumberland* 1828, a verdict was found for the plaintiff for 928*l.*, subject to the opinion of this Court on the following case:—

The plaintiff produced and proved the execution, by the defendant, of the writing-obligatory in the declaration mentioned, which was duly stamped.

The *Scotch* bond mentioned in the condition of that writing-obligatory, was also produced and read in evidence, impressed with a stamp of 1*l.* 15*s.*, which the defendant's counsel contended was insufficient. By the *Scotch* bond, (which began by reciting that on the 16th of *May* 1826, a sequestration was issued against *Allardice* and Co., the choice of an interim factor, the examination of *Allardice* and Co., and an offer by *W. Gracie* to pay 14*s.* in the pound to all the creditors, and to find security, which proposal was accepted by more than nine-tenths of the creditors at a meeting duly convened,) *W. Gracie* as principal, and *Annandale* as

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surety, bound themselves to pay to the creditors 14s. in the pound of their respective debts; and *W. Gracie* thereby bound himself to save *Annandale* harmless from his said cautionary obligation, and of all costs and skaith, damage and expenses, which he should sustain by reason of his becoming cautioner as aforesaid.

The plaintiff also proved, by other evidence, that a sequestration issued against *Allardice* and Co. on the 16th May 1826; that many just and lawful creditors proved debts under it; and that to such creditors, and to others, who were just and lawful creditors of *Allardice* and Co. at that date, he had paid instalments amounting to 1528*l.*, but had been repaid 600*l.*, leaving a balance of 928*l.* due to him; for which sum the verdict was ultimately taken. The plaintiff also proved, but not otherwise than by the production of the *Scotch* bond, that the date stated in that bond as the date of the sequestration mentioned therein, was the said 16th of May.

There was not any evidence of more than one sequestration against *Allardice* and Co.

The questions for the opinion of the Court were,

First, Whether it was incumbent on the plaintiff to give the *Scotch* bond in evidence; and

Secondly, Whether that bond was properly received in evidence; being stamped with a stamp of 1*l.* 15*s.* only.

The case was now argued by

Cresswell for the plaintiff. First, the plaintiff was not bound to give the *Scotch* bond in evidence. The condition of the bond upon which the action was brought, recited all the material parts of that bond, and those recitals bound the present defendant. The only ground upon which it can be said that the *Scotch* bond was a
material

material part of the plaintiff's evidence is, that the *English* bond refers to the date of the sequestration mentioned in the *Scotch* bond. But the plaintiff proved aliunde that a sequestration issued against *Allardice* and Co., and the date of it; and as only one sequestration was proved to have been issued, it must be assumed that the sequestration so proved was the same with that mentioned in the *Scotch* bond. But, secondly, the stamp on the *Scotch* bond was sufficient. It was not for any particular sum, nor to secure an unlimited account current. He was then stopped by the Court, who called upon

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Ingham to support the objection to the stamp. The bond in question was given in pursuance of the 54 G. 3. c. 137. s. 59. Now, in order to make the proceedings under that section valid, nine tenths of the creditors in number and value must concur, the amount of their claims must, therefore, be ascertained, and the bond should have had an ad valorem stamp. Again, the bond is for two things wholly different from each other. First, *Gracie* and *Annandale* are bound to the creditors, and then the former is bound to indemnify the latter. It is true that in this action the plaintiff only uses it as an indemnity bond, but if the stamp is not sufficient to make it admissible for all purposes, it cannot be received for any, *Corder v. Drakeford* (a), *Clayton v. Burtenshaw* (b). In cases where the obligation cannot be destroyed as to one clause without affecting the rest of the deed, it may be said that there is an unity of purpose throughout, and that one stamp only is requisite,

(a) 3 Taunt. 382.

(b) 5 B. & C. 41.

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but here the obligation of both *Gracie* and *Annandale* to the creditors, and that of *Gracie* to *Annandale* are wholly separate, the latter might be destroyed without affecting the former.

Per Curiam. It cannot be said that this bond was given for any certain sum of money so as to require an ad valorem stamp, nor does it come within any of the descriptions of bonds given in the schedule to the 55 G. 3. c. 184., except the general one, "bonds not otherwise charged." The stamp, therefore, was sufficient in amount. In *Lopez v. De Tastet* (c), a verdict was obtained for 37,000*l.*, and a new trial was granted, upon the defendant procuring a bond of *Glyn and Co.* to secure the damages and costs to be recovered, and for such a bond a stamp of 1*l.* 15*s.* was held sufficient. Neither was a distinct stamp necessary in this case, in consequence of the obligation on *Gracie* to indemnify *Annandale*. The whole appears to have been one transaction, and *Gracie's* agreement to indemnify *Annandale* was no doubt the consideration which induced the latter to become surety for *Gracie's* performance of his agreement with the creditors of *Allardice* and Co.

Postea to the plaintiff.

(a) 8 Trinit. 712.

in The King v. The Inhabitants of Atherstone & Wardle No. 1829.

The KING *against* The Inhabitants of
BIRMINGHAM.

UPON an appeal against an order of two justices, whereby *W. Stean*, his wife and children, were removed from the parish of *Birmingham* in the county of *Warwick*, to the township of *Atherstone* in the said county; the sessions confirmed the order, subject to the opinion of this Court on the following case:—

W. Stean, the pauper, being settled at *Atherstone*, and unmarried, went to live with *James Owen*, a button-caster, of *Birmingham*. After he had been with him some time, *Owen* hired him for a year at the wages of 4s. 6d. per week; nothing was said about *Sundays*. It was a part of the terms of hiring that the pauper was to work from six in the morning to seven in the evening, and might make as much overwork as he chose. He received earnest when he was hired. He served his master under this contract for a year, during which he lived in his master's house and boarded himself, he lived there on *Sundays* as well as week days, and on *Sunday* morning he used to ask if any thing was to be done, and if there was, he did it. He made a good deal of money by overwork, but never did any for any one but the master, and was never paid for it but by him; he was allowed 2d. an hour for overwork. At the expiration of the first year, he was hired by *Owen* for a second year on the same terms, except that he was to have 5s. 6d. per week wages, and 4d. an hour overwork. He served the whole of the second year. He

A pauper was hired for a year, at the wages of 4s. 6d. per week, to work from six in the morning to seven in the evening, with liberty to make as much overwork as he pleased: Held, that this was an exceptive hiring, and that no settlement was gained by serving under it.

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was then hired for and served a third year upon the same terms, except that he was to have 6s. a week, and 6d. an hour for overwork.

Goulburn Serjt. and *Amos* in support of the order of sessions. The pauper did not gain any settlement by hiring and service in *Birmingham*. To constitute a good hiring for a year, the servant must be under the control of the master during the whole year. In *Rex v. North Nibley (a)*, a service under a hiring for five years as a colt shearman, to work twelve hours each day, was held not to give a settlement, because the servant was under his master's control during the twelve hours only, and could not be compelled to work at other hours. So in this case the pauper was under his master's control during thirteen hours of each day only, and could not be compelled to work at other times. This is distinguishable from *Rex v. Byker (b)*; there the time was mentioned as the measure of wages only. Here the pauper was at all events to receive 4s. 6d. per week, and to work from six o'clock in the morning till seven in the evening. The time, therefore, was not mentioned as the measure of wages. This is very like the case of *Rex v. Kingswinford (c)*. There service under a hiring for seven years, to work thirteen hours in the day, *Sundays* excepted, was held not to give a settlement; the agreement being construed to mean that the pauper was to be his own master on *Sundays* and *other days*, after he had served the thirteen hours.

Hill contra. The question which arises in this case upon the construction of the contract of hiring, is not

(a) 5 T. R. 21.

(b) 2 B. & C. 114.

(c) 4 T. R. 219.

merely

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EARLY *against* GARRETT and LANKESTER.

The assignees of *A.* proposed to sell to *B.* a piece of land, with all faults and defects. Before any conveyance was executed, the latter asked the assignees whether any rent had ever been paid for the land. They replied, none had been paid by the bankrupt, or by any person under whom he claimed. In fact, rent had been paid by the person who had sold the land to the bankrupt. That person having recovered possession of the lands, it was held, in an action brought against the assignees to recover back the purchase-money, that it was properly left to the jury to say, whether the assignees, at the time when they represented that no rent had been paid bona fide believed that to be true, and the jury having found that they did; it was held, that the plaintiff was not entitled to recover back the purchase-money.

ASSUMPSIT for money had and received. Plea, non assumpsit. At the trial before *Littledale J.* at the Spring assizes for the county of *Hants* 1829, it appeared that the action was brought to recover the sum of 11*l.* 14*s.* 6*d.*, paid to the defendants as the purchase-money of a piece of land which had originally been glebe land, belonging to the rectory of *St. Mary, Southampton*, and had been taken by a canal company by virtue of an act of parliament passed in the year 1798. The rector, the Rev. *F. North*, did not receive the purchase-money, nor did he execute any conveyance of the land, but in the year 1799 granted a lease of that and other land to *John Fox* for ninety-nine years, if he the Rev. *F. North* should so long continue rector and incumbent. The company afterwards abandoned their canal, and *Fox* in 1813 gave up his lease to his son, who held the land until 1823, when he let one *Cox* into possession, under an agreement to pay 4*l.* rent for the first year, and 5*l.* for every succeeding year, with a power of re-entry in default of payment. This agreement recited that the land was held by lease of the Rev. *F. North*. Two years' rent had been paid by *Cox* to *Fox*. The former having built a house on the land, on the 25th of *March* 1825 agreed to sell the property to *W. Coward* for a sum of 60*l.*, and on the 2d of *April* 1825 a feoffment was executed, accompanied with livery

of seisin, and a fine was afterwards levied. *Coward* afterwards became bankrupt, and the defendants were appointed his assignees. The plaintiff being indebted to the defendant *Lankester*, offered to sell him a freehold estate. *Lankester* accepted the offer, on condition that the plaintiff would purchase of him and his co-assignee the piece of canal land in question, to which the plaintiff agreed. By an agreement of the 5th of *April* 1828, between the assignees and the plaintiff, reciting that the plaintiff had paid the sum of 111*l.* 14*s.* 6*d.* for the purchase of the piece of land in question, they, the assignees, agreed to convey to the plaintiff, his heirs and assigns, the messuage and tenement therein particularly described, in which said conveyance should be contained only the following covenants on the part of *Garret* and *Lankester*; that is to say, that they had not done any act nor permitted any, whereby the said premises were affected in title or otherwise, that all persons claiming under them should do such further acts as might be lawfully and reasonably required by the plaintiff, his heirs and assigns, and at his and their own expense; but so that the defendants or either of them should not be obliged to enter into any form of covenant whereby they might in any manner warrant the title to the said premises or the validity of the commission of bankruptcy against *Coward*, or any proceedings taken under the same, he the plaintiff having agreed to accept a conveyance of such right or title as might be the defendants', with all faults and defects (if any). It was proved by the attorney who was employed by both parties to prepare this agreement, that before it was executed, *Lankester* produced to him the feoffment, and præcipe, and concord of fine, and stated that there were

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no other documents except the proceedings in *Coward's* bankruptcy. The same witness proved that the plaintiff then asked the defendants whether any rent had ever been paid, and that they replied that no rent had ever been paid, either by *Coward* or any person under whom he claimed. There was some evidence to shew that the defendants did know that rent had been paid by *Cox* to *Fox*. On the 28th of May 1828, *Fox* not having received any rent for the last three years, demanded possession; which being refused he commented an ejectment against the tenants, obtained judgment, and executed a writ of possession. Upon this evidence it was contended on the part of the plaintiff, that the consideration upon which the purchase-money had been paid having failed, the plaintiff was entitled to recover it back. The learned Judge was of opinion, that mere non-communication was not sufficient, it must be fraudulent; and he told the jury, that if the defendants knew at the time when the agreement was executed, that rent had been paid to *Fox*, the non-communication of that fact was fraudulent, and that the plaintiff was entitled to recover; but if the defendants really believed that no rent had ever been paid or was payable to *Fox*, then the non-communication was not fraudulent, and they were not liable: and he told them to find for the plaintiff if they were of opinion that the defendants knew that rent had been paid or was payable to *Fox*, otherwise for the defendants. The jury having found for the defendants, a rule nisi had been obtained for a new trial.

C. E. Williams and *Maret* now shewed cause. It is clearly established, that where the purchase-money is paid and the conveyance executed, and the purchaser is

is evicted by a title to which the covenants do not extend, he cannot recover back the purchase-money. But if the defect do not appear upon the title-deeds, and the vendor is aware of the defect, and conceals it from the purchasers, he is guilty of a fraud, and the purchaser may maintain an action on the case in the nature of deceit; but in such action it would be necessary to allege and prove that the seller knew of the defect and concealed it. Here the jury have found that the vendor did not know that any rent was payable to *Fax*. They have, therefore, negatived fraud.

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Serjt. *E. Lawes* and *Follett* contra. In *Cripps v. Reade* (a) the defendant, supposing himself the legal representative of lessee for years, sold the term, and delivered the lease to the plaintiff; but without any assignment or formal conveyance, saying, the premises were his, and if any thing happened, he would see the plaintiff righted. And it was held, that the plaintiff might maintain an action against him for money had and received, the rightful administrator of tenant for years having ousted the plaintiff by ejectment. There Lord *Kenyon* said, the whole passed by parol, and it proceeded on a misapprehension by both parties that the defendant was the legal representative of the lessee, though it turned out afterwards he was not. So in this case there was a misapprehension by the defendants, who thought that rent had not been paid, if they did not fraudulently represent the fact to be so.

BAYLEY J. It was left to the jury to say whether the defendants really believed that no rent had been paid,

(a) 6 T. R. 606.

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or was payable, and the jury found that the defendants did so believe. Their assertion on that subject, therefore, was not fraudulent. I make no distinction between an active and a passive communication. If a seller fraudulently conceal that which he ought to communicate, it will render the contract null and void. But the authorities establish that the concealment must be fraudulent. The jury have found that the defendants had no knowledge that rent had been paid to *Fox*. Here was, therefore, no fraudulent concealment, and the plaintiff was not entitled to recover.

LITLEDALE J. It has been held, that where a man sells a horse as his own, when in truth it is the horse of another, the purchaser cannot maintain an action against the seller, unless he can shew that the seller knew it to be the horse of the other at the time of the sale: the scienter or fraud being the gist of the action where there is no warranty; for there the party takes upon himself the knowledge of the title to the horse and of his qualities (*a*). I thought that this was an analogous case, and left it to the jury to say whether the concealment was fraudulent or not.

PARKE J. The decisions shew, that the purchaser cannot recover unless he prove fraud on the part of the seller. Here the plaintiff paid his money for the land, to be taken with all faults (*b*). That being so, I think that the learned Judge properly stated to the jury that mere non-communication was not sufficient to avoid the

(*a*) *Springwell v. Allen*, 2 East, 448.

(*b*) See *Baglehole v. Waters*, 3 Camp. 154. *Schneider v. Heath*, 15. 506. See also, 1 Co. Lit. 384 a.

contract, but that it must be fraudulent. The question in substance left to the jury was, whether the concealment was fraudulent. They were told that if *Lankester* believed that rent had been paid or was payable to *Fox*, the non-communication of that fact was fraudulent. They have found by their verdict that there was no fraudulent concealment. The rule for a new trial must therefore be discharged.

Rule discharged.

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CODLING *against* JOHNSON.

TRESPASS for breaking and entering plaintiff's close with carts, horses, &c. Sixth plea, a prescriptive right of way in one *Bourne*, for himself and his servants, tenants and occupiers of a certain close, over the locus in quo, from a certain highway to the said close of *Bourne*; and justification by defendant as his servant, and by his command. Traverse of the right of way. At the trial before *D'Oyly* Serjt. at the Summer assizes for Nottingham 1828, the defendant proved an user of the way by persons having rights of common over (amongst others) the close of *Bourne*, for a period of time commencing before the inclosure hereinafter mentioned; and the plaintiff, on the other hand, proved certain acts of interruption, and also that *Bourne's* close (in right of which the way was claimed in the sixth plea), until 1771, was parcel of an open common, which was then inclosed under the provisions in an act of parliament; and that close, together with some others, was allotted to *Bourne's* ancestor. Upon this evidence it was objected, that as the close was a modern inclosure, the claim of a right of way to it by prescription could not be supported. The learned Judge reserved

Where, in trespass quare clausum fregit, defendant prescribed in a quod estate for a right of way over the locus in quo, and it appeared that the defendant's land had, within fifty years, been part of a large common, and afterwards inclosed under the provisions of an act of parliament, and allotted to the defendant's ancestor: Held, that notwithstanding this evidence, the right claimed by the defendant's plea might, in law, exist; and the jury having found that in fact it did exist, the Court refused to disturb the verdict.

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that question for the opinion of the Court, and left the question of the existence of a right of way over the locus in quo to *Bourne's* close to the jury, who found the fact for the defendant. In last *Michaelmas* term a rule nisi was obtained for entering a verdict for the plaintiff for 1s.

Adams Serjt. and *Hill* shewed cause. The finding of the jury that the plea was proved, makes an end of the question. The evidence that the land, in respect of which the way was claimed, had been formerly part of an unclosed common, does not alter the case. The fee must at that time have belonged to somebody, no matter to whom, and he might have the right of way; and the jury have found that in fact the owner of the estate now vested in the defendant had the right of way.

N. B. Clarke contra. The plea in question was not proved, and the finding of the jury upon it is manifestly wrong. Supposing the way to have existed from time immemorial, that before the inclosure must have been for the use of the commoners, who would enjoy it, not in respect of their common rights, but in respect of the land to which the right of common was appurtenant.

BAYLEY J. I am of opinion that the rule must be discharged. It appears by the report, that the jury were satisfied of the existence of this immemorial right of way. Suppose this land to have been part of the waste before the inclosure, then the lord might have the right for himself and his tenants to use the way, and then each person having an allotment under the inclosure would have the right of way. There was evidence of the exercise of the right of way by those who had the allotments; whence the jury might fairly infer that the

the lord originally had the right, and that it passed with the allotments.

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LITTLEDALE J. If the evidence had been confined to acts of using the way since the inclosure, I think it would not have supported the plea. But before the inclosure the way existed. At that time the land was either common field or waste subject to rights of common. If the former, probably each proprietor would have a right of way to his own land: if the latter, the lord, and through him the commoners, might have it, and then it would go together with the allotments.

PARKER J. The learned Judge reports, that he left to the jury the question, whether the immemorial right stated in the sixth plea was proved, and they found that it was. He is not dissatisfied with the verdict, and there is no rule of law which militates against the finding. From the usage, the jury might infer that the lord, if the fee were in him before the inclosure, had the right of way. The rule for entering a verdict for the plaintiff must, therefore, be discharged.

Rule discharged.

SPARGO *against* HUGH BROWN.

DECLARATION for taking an excessive distress, with a count in trover. Plea, not guilty. At the trial before *Allan Park J.*, at the Summer assizes for the county of *Cornwall* 1828, the plaintiff abandoned the counts for the excessive distress, and claimed to re-

In an action of trover, brought to recover the value of goods distrained, on the ground that the defendant was not the plaintiff's landlord, the plaintiff proved payment of rent to another person. The defendant tendered in evidence accounts rendered to him by that person, to shew that he had accounted for the very rents received from the plaintiff: Held, that the accounts were not admissible in evidence, the person who rendered them being alive, and capable of being a witness, and not identified in interest with the plaintiff.

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cover, on the count in trover, the value of goods and chattels belonging to the plaintiff, which the defendant had distrained for half a year's rent alleged to be due at *Lady-day* 1828. It was proved that the distress had been made by the defendant, and that the rent had been levied and paid to the defendant's solicitor, in the presence of the defendant. The question was, whether the plaintiff was tenant to the defendant or *John Brown*. The plaintiff proved that his (the plaintiff's) father had taken the premises in *Michaelmas* 1817, and that he had held them till *Michaelmas* 1827, and during the whole of that time had paid rent to *John Brown*. The defendant, *Hugh Brown*, had distrained on plaintiff's father for rent to *Michaelmas* 1827: but *John Brown* replevied the goods. The defendant, in order to shew that the rent paid by the plaintiff's father to *John Brown* was paid to the latter as the agent of the defendant, offered in evidence accounts rendered to him by *John Brown*, in which he described himself as the agent of the defendant. It was objected that *John Brown*, not being dead, ought to have been called as a witness, and that the accounts were not admissible in evidence. The learned Judge was of that opinion, and rejected the evidence. A verdict having been found for the plaintiff, a rule nisi had been obtained for a new trial, on the ground that the evidence had been improperly rejected.

Schoyn and *Follett* now shewed cause. The evidence was properly rejected. The general rule is, that every material fact must be proved by testimony on oath. But the declarations of a party to a suit are admissible evidence against him. So are the declarations made by a nominal party who sues as trustee for the benefit of another, or by a party who is really interested in the suit,

suit, though not named in the record, *Hanson v. Parker* (a). Upon this principle, the declarations of a rated inhabitant of either parish have been held to be admissible against the other rated inhabitants of the parish, in an appeal against an order of removal, *Rex v. Hardwicke* (b); and the declarations by the petitioning creditor of a bankrupt to be admissible in an action against the sheriff, where the assignees had given instructions for the defence, *Dowden v. Fowler* (c). But here *John Brown* had no interest in the suit. The action was against *Hugh Brown* as a tortfeasor; and the accounts were produced by the defendant to prove that *John Brown* had accounted to him, the defendant, for the rent received of the plaintiff. This does not fall within the class of cases where declarations of a party identified with the party on the record have been held to be admissible. The accounts were not admissible as declarations made against the interest of the party making them, because *John Brown* was living at the time of the trial, *Barrough v. White* (d).

Halcombe contra. The plaintiff claimed to recover the value of the goods, on the ground that the defendant was not his landlord, and had no right to distrain for rent. The issue between the parties at the trial was, in substance, whether the defendant or *John Brown* was the person entitled to distrain. As the plaintiff claimed to recover the value of the goods on the ground that rent had been paid to *John Brown*, the accounts rendered by the latter to the defendant of the rents received by him were evidence against the plaintiffs, on the ground that there was a community of in-

(a) 1 Wils. 257.

(b) 11 East, 578.

(c) 4 Campb. 38.

(d) 4 B. & C. 325.

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Brown.

terest between him and *John Brown*. In *Harrison v. Vallance* (a) trover was brought for a deed which *Vallance* had admitted he detained at the request of *Reeves*, and in the detention of which *Reeves* was interested; and it was held that declarations of *Reeves* were properly received in evidence. [Bayley J. There *Reeves* was identified with *Vallance*: *Vallance* detained the deed by the direction of *Reeves*. Here there was no evidence to identify *John Brown* with the plaintiff.]

BAYLEY J. The general rule is, that every material fact must be proved by testimony on oath. There is an exception to that rule, viz. that the declarations of a party to the record, or of one identified in interest with him, are, as against such party, admissible in evidence. But, generally speaking, mere declarations not upon oath are not evidence. The acts of a party may be evidence. But here the defendant merely produced a paper in the handwriting of *John Brown*, without shewing that he was identified with the plaintiff.

LITLEDALE J. The general rule is, that where a person is living, and can be called as a witness, his declarations made at another time cannot be received in evidence. To this rule there is an exception, viz. where the party making the declaration can be identified with the party against whom they are offered. Here it was not shewn that the action was brought for the benefit of *John Brown*, and he was not identified with the plaintiff.

PARKE J. Concurred.

Rule discharged.

(a) 1 Bingham 45.

The KING *against* The Inhabitants of ASHFIELD-
CUM-THORPE.

UPON appeal against an order of two justices, whereby *W. M. Miller* and his wife and children were removed from *Snape* to *Ashfield-cum-Thorpe*, both in the county of *Suffolk*, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The pauper, who was previously a settled inhabitant of *Ashfield-cum-Thorpe* (after the passing of the 59 G. 3. c. 50., and before that of the 6 G. 4. c. 57.), *bonâ fide* hired a house and land for one whole year in the parish of *Snape*, at a rent exceeding 10*l.*, and held, occupied, and paid that rent for more than one year; though at the time the value of the holding and occupation was under 10*l.* a year.

Brodrick in support of the order of sessions. The statute 13 & 14 Car. 2. c. 12. having confined the power of removal to cases where a person comes to settle on any tenement under the yearly value of 10*l.*, any person who before the 59 G. 3. c. 50. came to settle on a tenement above that yearly value was held to gain a settlement. The latter statute was not intended to alter the law (so far as the value of the tenement is concerned), but requires also that it should be *bonâ fide* hired for the sum of 10*l.* by the year. This is manifest from the subsequent statute 6 G. 4. c. 57. That statute, after reciting that the settlement of the poor had been made in some instances to depend upon the annual value of tenements and that the ascertaining such value had given rise

After the passing of the 59 G. 3. c. 50. and before the statute 6 G. 4. c. 57. came into operation, a pauper *bonâ fide* hired a tenement at and for the sum of 10*l.* a year, and held and occupied and paid rent for the same for the term of one whole year, but the actual annual value of the same was less than 10*l.* Held, that he thereby gained a settlement, the actual value of the tenement being immaterial, provided it be *bonâ fide* hired for the sum of 10*l.* a year.

1829.

—
The King
against
The Inhabit-
ants of
ASHFIELD-
CUM-THORPE.

to very expensive litigation, repeals the 59 G. 3. c. 50., and then enacts, inter alia, that it shall not be necessary to prove the actual value of such tenement. That is tantamount to a legislative declaration that the statute 59 G. 3. c. 50. did not alter the law as to the value of the tenement. The tenement hired in *Snape*, was, therefore, not of sufficient value to confer a settlement.

BAYLEY J. The statute 59 G. 3. c. 50. requires that the tenement be *bonâ fide* hired at and for the sum of 10*l.* a year. It seems to me that by that statute the actual value is immaterial, provided the tenement be *bonâ fide* hired at the specified rent. The provision "that it shall not be necessary to prove the actual value of the tenement," was introduced into the 6 G. 4. c. 57. for greater caution.

LITLEDALE J. concurred.

PARKE J. One fertile source of those disputes and controversies (mentioned in the recital of the 59 G. 3. c. 50.) was the necessity of proving the value of the tenement; and that statute, in order to prevent litigation, requires that the tenement shall be *bonâ fide* hired at the sum of 10*l.* a year. Generally speaking, the rent agreed upon between the landlord and tenant is the best criterion of value, and I think the legislature meant to dispense with any other proof of value. If the tenement hired turns out to be of much less annual value than 10*l.*, that would be evidence to shew that it was not *bonâ fide* hired at that sum. But if it be *bonâ fide* hired at that sum, I think that is sufficient. That being so, the pauper gained a settlement in *Snape*.

Order of sessions quashed.

AN
INDEX
TO THE
PRINCIPAL MATTERS.

ACTION ON THE CASE.

1. Case by a reversioner of a house in *Cheapside* against the owner of the adjoining house, for pulling it down without shoring up the plaintiff's house, in consequence whereof it was impaired, and in part fell down: Held, first, that upon this declaration the plaintiff could not recover on the ground of the defendant's not having given notice that he was about to pull down his house, that not being alleged as a cause of the injury; secondly, that as the plaintiff had not alleged any right to have his house supported by the defendant's, he was bound to protect himself by shoring, and could not complain that the defendant had neglected to do it. *Peyton and Others v. the Mayor and Commonalty of London, as Governors of St. Thomas's Hospital*, T. 10 G. 4. Page 725
2. By a cognovit, *A.* confessed the action, and that *B.* had sustained damage to the amount of 3000*l.*; and that in case *A.* should make

default in payment of 259*l.* on the 7th of *May*, *B.* should be at liberty to enter up judgment for 3000*l.*, and sue out execution for 259*l.* and costs, which would have left a principal sum of 1650*l.* due to *B.* *A.* not having paid the 259*l.* on the 7th *May*, *B.* entered up judgment, and sued out execution for 3011*l.* indorsed with a direction to the sheriff requiring him to levy 1967*l.*, and *A.* was arrested and detained in prison for that sum: Held, that *A.* might maintain an action against *B.* for having caused him to be arrested and imprisoned for a larger sum than he ought.

After the arrest, *A.* applied to a judge at chambers to be discharged out of custody; and it being represented that by *A.*'s continuing in prison, he would commit an act of bankruptcy, the judge, on the 4th *December* 1827, made the following order:—"Upon hearing counsel for the plaintiff and defendant, I order that the defendant be discharged out of the custody of the sheriff of the county

county of *Cambridge* as to this action, upon giving a fresh warrant of attorney for the sum of 5000*l.*, with defeasance on payment of 259*l.* 11*s.* 7*d.* and the costs, on the 4th day of *January* next; and the further sum of 1650*l.*, with the interest due thereon, on the 4th of *August* next, with liberty to issue execution for the smaller sum, if not duly paid; and afterwards for the larger sum, if default be made in the payment of the said sum of 1650*l.* and interest on the said 4th of *August* next; and, upon giving such warrant of attorney, the present judgment be set aside, and that the mortgage do remain as a security, the defendant hereby undertaking not to bring any action for the imprisonment." *A.* did not avail himself of the order.

Held by *Parke J.*, that this order embodied an absolute agreement of the parties, founded upon good consideration, that *A.* should be forthwith discharged out of custody, and that he should bring no action for false imprisonment; and, therefore, that such an action was not maintainable. *Wentworth, Gent. One, &c. v. Bullen, Gent. One, &c., S. 10 G. 4.* Page 840

ADMINISTRATRIX.

See EXECUTOR, 5.

AFFIDAVIT TO HOLD TO BAIL.

See PRACTICE, 8.

ALDERMAN.

See CORPORATION, 1. 3.

ALMS-HOUSES.

See POOR RATE, 6.

APPORTIONMENT.

ANNUITY.

See DEED, 2.

APPEAL.

By a local act, the management of the parish poor was vested in the churchwardens, overseers, governors, and directors of the poor; and an appeal to them was given to any person thinking himself aggrieved by any thing to be done by virtue of the act; and if the appellant should be dissatisfied with their *determination*, then an appeal was given to the quarter sessions. A parishioner having applied, for relief against a rate, to the churchwardens, overseers, governors, and directors, they, at a meeting, resolved to take no further notice of his application: Held, that, as they had not come to any determination on the subject matter of his complaint, the parishioner could not appeal to the quarter sessions, but that he ought first to have applied for a mandamus to compel the churchwardens, overseers, governors, and directors, to hear the appeal. *The King v. the Justices of Kent, H. 9 & 10 G. 4.*

Page 283

2. Where there is an appeal against a poor rate, on the ground that some person is omitted who ought to be rated, the justices at sessions cannot hear the appeal, unless notice of the appeal and the ground of it has been given to the party said to have been improperly omitted. *The King v. Brooke, T. 10 G. 4.* 915

APPORTIONMENT.

See ASSESSOR.

ARBI-

ARBITRAMENT.

1. Where a submission to the award of two persons authorized the appointment of an umpire by them, if they should disagree: Held, that, they might choose an umpire before they entered upon enquiry.

The declaration on the award made under this submission, after stating the choice of an umpire, alleged that the arbitrators and umpire made the award: Held, that, taking the whole together, it was substantially an allegation that the umpire made the award.

The award, after reciting that *A. B.* and *C. D.* had been appointed arbitrators, and that they had appointed *E. F.* umpire, proceeded, "We, the said arbitrators, do award," &c., and was signed by the two arbitrators and the umpire: Held, that the latter, by signing the award, adopted the language as his. *Bates v. Cooke*, *E. 10 G. 4.* Page 407

2. By an order of nisi prius, an action at law, and all matters in difference between the parties at law and in equity, including a chancery suit, were referred to an arbitrator, who by his award ordered that a sum of money should be paid to the plaintiff in the action, and that the bill in chancery should be dismissed, and that all proceedings therein should utterly cease and determine: Held, that the suit in equity, and all matters in difference in that suit, and all matters in difference between the parties, were thereby finally determined, although one of the matters in dispute in the chancery suit was brought before the arbitrator as a matter in difference between the parties, and

was not otherwise disposed of than by the ending of the chancery suit. *Pearse v. Pearse et Uz.*, *E. 10 G. 4.* Page 484

3. A submission was made to two arbitrators, and to such third person as they should appoint; the award to be made by any two of the three. The two arbitrators met for the purpose of appointing a third; and not being able to concur in such appointment, it was agreed between them that each of them should name two, and that the names of the four should be put into a hat, and that the name drawn should be the third arbitrator; and the arbitrator was so appointed. The award was made by one of the arbitrators originally named, and the person so appointed by the two: Held, that the appointment of the third arbitrator was bad, inasmuch as the choice of the third ought to have been the act of the will and judgment of the two, and matter of choice, not of chance. *In the Matter of Cassell*, *T. 10 G. 4.* 624

4. Covenant with the assignees of *A.*, a bankrupt, on articles of agreement, entered into by *A.* before his bankruptcy, and the defendants, whereby, after reciting that differences existed between the plaintiff and the defendants respecting certain ships of war purchased by the former, they bound themselves to abide by the award of *W. S.* Breach, that defendants had revoked their submission. Plea, that before any award was made, *A.* became bankrupt, and all his interest in the subject matter of the reference was assigned to the provisional assignee. Replication, that the provisional assignee assigned to the plaintiffs. Demurrer and joinder: Held, that

as the subject-matter of the reference was taken out of the bankrupt, and assigned to the plaintiffs, who would not have been bound by the award, the submission was no longer mutual, and, therefore, was not binding; and the defendants, by giving notice to the arbitrator not to proceed, did not make themselves liable to an action. *Marsh and Others, Assignees of Rowe, v. Wood*, T. 10 G. 4. Page 659

5. Declaration stated, that in consideration that the plaintiff, at the request of the defendant, would enter into the employ of the defendant in a certain capacity for a year, at the rate of five guineas per week throughout the year, defendant undertook to employ him for a year, and alleged as a breach that the defendant dismissed the plaintiff from his employ before the end of the year without any reasonable or probable cause. The declaration contained counts for wages, and for work and labour, &c. The cause, which was commenced before the expiration of the year, was referred to an arbitrator, who awarded to the plaintiff a sum of money equivalent in amount to the wages he would have been entitled to receive from the defendant on the day when the action was commenced. No claim was made before the arbitrator for any compensation in damages for the dismissal, except so far as the special count in the declaration, and the evidence of the employment and the dismissal might amount to such a claim. The plaintiff having afterwards brought an action to recover a compensation in damages in consequence of the dismissal from the defendant's employ before the end of the

year; it was held, that the award of the arbitrator was a bar to such action. *Dunn v. Murray*, T. 10 G. 4. Page 780

ARREST.

See ACTION ON THE CASE, 2.

Where a party against whom a true bill for perjury had been found, and a warrant for her apprehension granted, was apprehended abroad and brought here in custody, and committed to prison for want of bail, the Court refused to discharge her on the ground that she had been improperly apprehended in the foreign country. *Ex parte Susanah Scott*, E. 10 G. 4. 446

ARTICLED CLERK.

See ATTORNEY, 2.

ASSESSOR.

By a local act for draining a particular district, the commissioners were authorized to assess and tax upon the whole district such sums as should be necessary for carrying into effect the objects of the act, and to elect assessors to apportion such sums of money amongst the several parishes, townships, and places within the district. The commissioners having appointed three assessors, the three met to agree upon an apportionment; two out of the three agreed, but the third would not concur: Held, that the making of the apportionment being matter of public duty and trust, an apportionment made by two, at a meeting of the three, was valid. *The King v. Whitaker*, T. 10 G. 4. 648

ASSIGN-

ASSIGNMENT.

See ASSUMPSIT, 2. DEED, 2.

ASSUMPSIT.

1. *A.* purchased goods upon credit, fraudulently intending, at the time of the contract, not to pay for them. *B.*, the vendor, brought assumpsit for the goods sold, before the time of the credit expired: Held, that this action was not maintainable, though the vendor might have treated the contract as a nullity, and have brought trover immediately to recover the value of the goods. *Ferguson and Another v. Carrington*, *H.* 9 & 10 *G.* 4. Page 59
2. *A.*, a silk-throwster, contracted with *B.* and *C.* for certain machinery to be made for him, and while the work was in progress, paid money on account. Before the machinery was finished, *B.* and *C.* assigned it to *D.* This circumstance was communicated by *D.* to *A.*, who said he must go on with the work, and he (*A.*) would see him paid. The machinery having been completed and delivered: Held, that *D.* might sue *A.* for the price of such parts of it as had been made by him after the assignment. *Oldfield v. Lowe*, *H.* 9 & 10 *G.* 4. 73
3. Where *A.* undertook, for a specific sum of money, to repair and make perfect a given article then in a damaged state, and did repair it in part, but did not make it perfect; it was held, that he could not, in an action of assumpsit, recover for the value of the work done and materials found. *Sinclair v. Bowles*, *H.* 9 & 10 *G.* 4. 92
4. The plaintiff was, by means of a fraud, induced to draw and pay away two cheques on his banker, amounting to 1390*l.* Six days after the date of the cheques, the defendants, acting bonâ fide, gave cash for them to a third person (who had not given value for them), presented the cheques, and obtained payment. In an action by the plaintiff to recover back this money: Held, that the cheques could not be treated as bills over due, and, therefore, taken by the defendants at their peril; but that the real question in the cause was, whether they had acted bonâ fide, and with due caution. *Rothschild v. Corney and Others*, *E.* 10 *G.* 4. Page 388
5. Where it was proved that *A. B.* had contributed to the funds of a building society, and had been present at a meeting of the society, and party to a resolution that certain houses should be built: Held, that this made him liable to an action for work done in building those houses, without proof that he had any actual interest in them, or in the land on which they were built. *Braithwaite v. Skofield and Others*, *E.* 10 *G.* 4. 401
6. *A.*, a loan contractor, in October 1822, delivered to *B.* certain scrip receipts, stating that *B.* had paid him 10 per cent. deposit in respect of a certain quantity of Neapolitan stock, and that on payment of the balance before the 1st of February 1823, the bearer would be entitled to certificates for that amount of stock. *B.* transferred the receipts to *C.* for a valuable consideration. *A.*, by advertisement, offered the holders of the receipts, upon certain conditions, an extension of time for payment of the balance due on them;

them; requiring, also, that the receipts should be left at his office, for the purpose of being marked as holden under the new conditions. The receipts transferred by *B.* to *C.* were by him sent to *A.*'s office, where they were indorsed by *A.* with *C.*'s name. The latter having failed to comply with the new conditions, *A.* refused to deliver the certificates or to return the deposit. *C.* claimed a return of the deposit, as being retained by *A.* without consideration: Held, that *C.* was not entitled to recover the same, because *B.* had full consideration for the deposit in the option which the scrip receipts gave him to become the proprietor of so much stock by payment of the balance of the price on the day named.

Assuming that *C.* had any right of action against *A.*, Quære, if money had and received could have been maintained? *Rothschild v. Hennings* (in Error), *E.* 10 G. 4. Page 470

7. *A.*, *B.*, and *C.* carried on trade in partnership, and *A.* was also in partnership with *D.* *A.* being indebted to the firm of *A.*, *B.*, and *C.*, before the dissolution of that partnership, unknown to *D.* indorsed a bill, and paid over money (belonging to *A.* and *D.*) in discharge of the private debt due from *A.* to *A.*, *B.*, and *C.*, and immediately afterwards indorsed the same bill to a creditor of the firm of *A.*, *B.*, and *C.* The partnership between *A.*, *B.*, and *C.* having been dissolved: Held, that *A.* could not maintain trover against *B.* and *C.* for the bill, nor assumpsit for the money paid by *A.* out of the funds of *A.* and *D.* to *A.*, *B.*, and *C.* in discharge of his private debt.

A. and *D.* having afterwards become bankrupt, it was held, that their assignees could not maintain such actions. *Jones and Others, Assignees, v. Yates and Young, E.* 10 G. 4. Page 532

8. Assumpsit against an executor on promises by the testator. Pleas, non assumpsit, and plene administravit. Plaintiff joined issue, and went to trial, and obtained a verdict on the plea of non assumpsit, and took judgment of assets quando on the plea of plene administravit: Held, that he was entitled to judgment for the costs to be levied de bonis propriis of the executor, if there were not assets of the testator sufficient to satisfy them. *Marshall and Another, Executor and Executrix, v. Wilder* (in Error), *T.* 10 G. 4. 655

9. Plaintiff sued as administratrix, upon promises to the intestate, and upon an account stated with her as administratrix of monies due to her in that character, and a promise to pay her: Held, that it thereby appeared that the contract was one made with the plaintiff and another person, within the words of the statute 28 Hen. 8. c. 15., and, therefore, that after a nonsuit the defendant was entitled to costs. *Dombiggin, Administratrix, v. Harrison, T.* 10 G. 4. 666

10. A bill purporting to have been accepted by *A.*, was presented for payment to his bankers on the day when it became due. The latter, believing it to be the genuine acceptance of *A.*, paid the amount; but on the following day, having discovered that the acceptance was a forgery, they gave notice of that fact to the party to whom they had paid the bill, and required him

to

ATTORNEY.

to return the money : Held, that the holder of a bill is entitled to know on the day when it becomes due, whether it is honoured or dishonoured ; and that no notice of the forgery having been given on the day the bill became due, the parties who had paid the money were not entitled to recover it back. *Cocks and Others v. Masterman and Others*, T. 10 G. 4. Page 902

11. The assignees of A. proposed to sell to B., a piece of land, with all faults and defects. Before any conveyance was executed, the latter asked the assignees whether any rent had ever been paid for the land ; the former replied, none had been paid by the bankrupt, or by any person under whom he claimed : in fact, rent had been paid by the person who had sold the land to the bankrupt. That person having recovered possession of the land, it was held in an action brought against the assignees to recover back the purchase money, that it was properly left to the jury to say whether the assignees, at the time when they represented that no rent had been paid *bonâ fide* believed that to be true ; and the jury having found that they did, it was held that the plaintiff was not entitled to recover back the purchase-money. *Early v. Garrett and Another*. T. 10 G. 4. 928

ATTACHMENT.

See BANKRUPT, 9.

ATTORNEY.

1. An attorney, in custody under an attachment for non-payment of money pursuant to a rule of

BANKER'S CHEQUE. 947.

court, is entitled to be discharged from custody on having become bankrupt, and obtained his certificate, even though he received the money in the course of his employment as attorney. *The King v. Edwards*, in a Cause of Long and Furze, T. 10 G. 4.

Page 652

2. A party was articulated as a clerk to one of two attorneys in partnership, and paid a premium, and acted as clerk to the two partners for two months, when the attorney to whom he had been articulated died ; the Court ordered the surviving partner to refund a portion of the premium, although at the time of the payment of such premium his partner was indebted to him, and the premium had been set off in account between them. *Esparic Bayley*, in the Matter of Harpe, T. 10 G. 4. 691
3. Where a Judge's order for taxing an attorney's bill is not obtained until after he has commenced an action for the amount, the defendant is not entitled to the costs of taxation, although more than one sixth is taken off by the Master. *Harbin, Gent., One, &c. v. Miles*, T. 10 G. 4. 755

AWARD.

See ARBITRAMENT.

BAIL.

See PRACTICE, 7. 13.

BANK OF ENGLAND.

See BILL OF EXCHANGE, 3.
EXECUTOR, 2.

BANKER'S CHEQUE.

The plaintiff was, by means of a fraud, induced to draw and pay away two cheques on his banker, amounting

amounting to 1330*l*. Six days after the date of the cheques, the defendants, acting bona fide, gave cash for them to a third person (who had not given value for them) presented the cheques, and obtained payment. In an action by the plaintiff to recover back this money: Held, that the cheques could not be treated as bills overdue, and therefore taken by the defendants at their peril, but that the real question in the cause was, Whether they had acted bona fide, and with due caution. *Rothschild v. Corney and Others*, *E.* 10 G. 4. Page 388

BANKRUPT.

1. *A.* purchased of *B.* a hop-marchant, a library, and paid him the value; *B.* at that time had committed an act of bankruptcy, of which *A.* had no knowledge: Held, that the assignees could not recover the value of the books, without at least tendering the price, inasmuch as the payment made by *A.* was declared valid by the 6 G. 4. c. 16. s. 82; and in order to give full effect to that enactment, *A.* must at least have a lien on the books in respect of which he had made the payment, until the assignees tendered him the sum paid. *Hill v. Fannell*, *H.* 9 & 10 G. 4. 234
2. Where a person, who had contracted for a certain quantity of oil, to be delivered to him, at a future day, at a certain price, became bankrupt before that day arrived, and obtained his certificate: Held, that he was nevertheless liable to an action for not accepting and paying for the oil, and that the proper measure of damages was the difference between the price, which he had contracted to pay for the oil, and the market-price at the time when the contract was broken. *Boorman v. Nash*, *H.* 9 & 10 G. 4. 234 Page 145
3. The concluding words of a warrant of commitment must be so limited as to have direct reference to the offence imputed in the preceding part; and, therefore, where a commitment, after reciting that the bankrupt had surrendered, and that the commissioners examined him, touching his trade, &c., and caused such examination to be reduced into writing, and read over to him; to which examination the bankrupt did refuse to sign his name (not having a reasonable objection to the wording thereof, or otherwise); required the gaoler to detain the bankrupt in custody until such time, as he should submit himself, and full answer make to the satisfaction of the commissioners to all such questions as should be put to him, and sign and subscribe such examination, as aforesaid, was holden to be void. *Ex parte Leak*, *H.* 9 & 10 G. 4. 234
4. A mortgagee having given notice to the tenants holding the mortgaged premises under leases granted by the mortgagor after the mortgage, is entitled to receive from those tenants the rents actually due at the time of the notice, as well as those which accrued due afterwards. And where such rents have been received by the agent of the mortgagor after his bankruptcy, and were not actually paid over: Held, that the agent might retain such rents in order to pay the interest accruing due on the mortgage to the mortgagee, who had required him to do so, and the assignees could not recover them. *Pope and Another, Assignees*

signees of Gilbert, v. Biggs, H. 9 & 10 G. 4. Page 245

5. By a composition deed, the insolvent assigned to four trustees all his goods, chattels, &c. upon trust to sell, and to apply the proceeds rateably in discharge of his debts amongst his creditors who should execute the deed; provided that the trustees and the creditors should, on or before a given day, make proof of the debts (if required), and execute that deed. The creditors, as a release of their respective debts, covenanted that they would not implead the insolvent or his goods. The deed was executed only by two of the trustees: Held, that the deed was not therefore void; and that the debt of a trustee who had executed it, was thereby extinguished; and that he could not sue out a commission of bankruptcy. *Small and Another, Assignees, v. Marwood, H. 9 & 10 G. 4.* 900

6. *A.* having two pipes of wine lying in a bonded warehouse, in the name of *B.*, who had given bond for the duties, sold them to *C.*, and gave him a delivery order; and it was at the same time agreed that *C.* should pay the duties. When they became payable, *B.* was called upon and paid them, and took away the wine to his own cellar. *A.* repaid the amount of duties to *B.*; *C.* never required *B.* to transfer the wine to his name, but he afterwards took away one pipe, and was charged with, and paid warehouse rent to *B.* *C.* afterwards became bankrupt, and his assignees demanded the other pipe: Held, that *B.* at *A.*'s request was entitled to keep it until the duties were repaid. *Winks and Another, Assignees, v. Hassall and Another, E. 10 G. 4.*

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7. *A.*, *B.*, and *C.* carried on trade in partnership, and *A.* was also in partnership with *D.* *A.* being indebted to the firm of *A.*, *B.*, and *C.* before the dissolution of that partnership, unknown to *D.*, indorsed a bill and paid over money (belonging to *A.* and *D.*) in discharge of the private debt due from *A.* to *A.*, *B.*, and *C.*, and immediately afterwards indorsed the same bill to a creditor of the firm of *A.*, *B.*, and *C.* The partnership between *A.*, *B.*, and *C.* having been dissolved: Held, that *A.* and *D.* could not maintain trover against *B.* and *C.* for the bill, nor assumpsit for the money paid by *A.* out of the funds of *A.* and *D.* to *A.*, *B.*, and *C.*, in discharge of his private debt. *A.* and *D.* afterwards became bankrupt, it was held that their assignees could not maintain such actions. *Jones and Others, Assignees, v. Yates and Young, E. 10 G. 4.* Page 532

8. In an action of trover brought by a person against whom a commission of bankrupt had issued, against his assignees, to recover goods which they had, as such assignees, sold, it appeared that the bankrupt had assisted the assignees by giving directions as to the sale of the goods, and that, after the issuing of the commission, he gave notice to the lessors of a farm which he held, that he had become bankrupt, and that he was willing to give up the farm, and in consequence, the lessors received the lease, and accepted possession of the premises: Held, first, that the interference of the plaintiff in the sale of his goods was referable to an intention on his part to take care of the property, and see that the most was made of it, and that it did not amount to an assent to the sale, and that he was not

3 Q thereby

thereby estopped from bringing an action against his assignees.

Secondly, that he was not estopped by the act of having given up his lease to his lessors, the assignees not being parties or privies to that transaction.

The plaintiff, about two years before the issuing of the commission, had entered into an agreement for the purchase of five acres of land; one of the terms of the agreement being, that, 4s. for every 1000 bricks made on the land should be paid to the vendor, in part of the purchase money. The plaintiff made bricks from clay dug from the land. During part of the time he was in partnership with two others, who had no legal or equitable interest in the land, but that partnership had been dissolved before the issuing of the commission: Held, that the plaintiff was not a person liable to the bankrupt laws within the meaning of the 6 G. 4. c. 16. s. 2. *Heane v. Rogers and Another*, E. 10 G. 4.

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9. An attorney, in custody under an attachment for non-payment of money pursuant to a rule of court, is entitled to be discharged from custody on having become bankrupt, and obtained his certificate, even though he received the money in the course of his employment as attorney. *The King v. Edwards*, in a cause of *Long v. Kurze*, T. 10 G. 4. 652

10. Covenant by the assignees of A., a bankrupt, on articles of agreement entered into by A. before his bankruptcy, and the defendants, whereby, after reciting that differences existed between the plaintiff and the defendants respecting certain ships of war purchased by the former, they bound themselves to abide by the award

of W. S. Breach, that defendants had revoked their submission. Plea, that before any award was made, A. became bankrupt, and all his interest in the subject-matter of the reference was assigned to the provisional assignee. Replication, that the provisional assignee assigned to the plaintiffs. Demurrer and joinder: Held, that as the subject-matter of the reference was taken out of the bankrupt, and assigned to the plaintiffs, who would not have been bound by the award, the submission was no longer mutual, and, therefore, was not binding, and the defendants, by giving notice to the arbitrator not to proceed, did not make themselves liable to an action. *Marsh and Others, Assignees, v. Wood*, T. 10 G. 4. Page 659

11. A. and Co. merchants at Liverpool remitted a bill to B. and Co. in London, with directions to get it discounted, and apply the proceeds in a particular way; B. and Co. did not get the bill discounted, but received the money when it became due. Before that time, A. and Co. had stopped payment, and desired to have the bill returned to them. A commission of bankruptcy having been issued against them before the money was received on the bill by B. and Co.: Held, that the latter were liable to be sued by the assignees for the amount, as money received to their use, and that B. and Co. could not set off a debt due to them from A. and Co. *Buchanan and Others, Assignees, v. Findlay and Others*, T. 10 G. 4.

738

12. Evidence of a trading which ceased before the 6 G. 4. c. 16. took effect will not support a commission of bankrupt issued after that time. *Surtees and Another*,

Another, Assignees, v. Ellison,
T. 10 G. 4. Page 750

Hewson v. Heard, ibid. 754

Palmer v. Moore, ibid. 754

13. Where bills of exchange were delivered by a trader in contemplation of bankruptcy to a creditor, with a view of giving him the preference, and the amount due on the bills was received by him after the bankruptcy: Held, in an action of trover, by the assignees, to recover the bills, that the receipt of the money by the creditor was not a conversion, and therefore that it was necessary for them to prove a demand and refusal, before the bills become due. *Jones and Others, Assignees, v. Fort, T. 10 G. 4.* 764
14. The assignees of A. proposed to sell to B. a piece of land with all faults and defects. Before any conveyance was executed, the latter asked the assignees whether any rent had ever been paid for the land. The former replied none had been paid by the bankrupt, or by any person under whom he claimed. In fact, rent had been paid by the person who had sold the land to the bankrupt. That person having recovered possession of the land, it was held, in an action brought against the assignees to recover back the purchase-money, that it was properly left to the jury to say whether the assignees at the time, when they represented that no rent had been paid bona fide, believed that to be true; and the jury having found that they did, it was held that the plaintiff was not entitled to recover back the purchase-money. *Early v. Garret and Another. T. 10 G. 4.* 928

BENEFICE WITH CURE.

See DEED, 2.

BILLS OF EXCHANGE.

See ASSUMPSIT, 10.

1. Where the drawer of a bill of exchange made it payable at his own house: Held, that the jury might fairly infer that it was an accommodation bill, which made it unnecessary to give him notice of nonpayment by the acceptor. *Sharp v. Bailey, H. 9 & 10 G. 4.* Page 44
2. Where the payee and holder of a promissory note appoints the maker his executor, the debt is discharged, and no action can be maintained on the note, even by a person to whom the executor has indorsed it. *Freakley v. Fox, H. 9 & 10 G. 4.* 130
3. A Bank of England note, which had been feloniously stolen in England in February 1828, was remitted, in May 1827, by a foreign merchant to his correspondent in this country, to whom he was indebted in a sum exceeding the amount of the note. The latter demanded payment; the Bank refused to pay, on the ground that the note had been stolen. At the time when the correspondent was informed of this, he had not made the foreign merchant any advance on the credit of the note: Held, first, that in trover for the note, the correspondent must be considered the agent of the foreign merchant, and that he could, therefore, recover upon his title only.
- Secondly, that in such action, it having been proved that the note had been stolen, it was incumbent on the plaintiff to shew that the foreign merchant had given full value for it.

Quære, Whether the property
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in a promissory note made in England, and payable to order of bearer, is transferable by indorsement or delivery in a foreign country. *De la Chaumette v. The Bank of England*, 1 H. 9 & 10 G. 4. Page 208

Where one of several partners in a banking house drew a bill in his own name, upon a third party, who accepted the same, upon condition that the drawer should provide for the same when due: Held, that all the partners in the banking firm could not recover on the bill. *Sparrow and Others v. Chisman*, 1 H. 9 & 10 G. 4. 241

When a bill of exchange became due, it was agreed between the drawer and acceptor that it should be renewed; and on the back of the bill, another instrument for the same value was drawn and accepted by the same parties, but it was not stamped. At the same time, the names of the drawer and acceptor were erased from the first bill. In an action on that bill, the judge left it to the jury to find whether it had been cancelled with the consent of the drawer; and the unstamped instrument was submitted to the view of the jury: they having found that the bill was cancelled with the consent of the drawer, this court made a rule for a new trial absolute, on the ground that the jury ought not to have been permitted to draw a conclusion of fact from the unstamped instrument. *Swedding v. Hulse*, 1 H. 9 & 10 G. 4. 365

A promissory note, payable to B, or order, on demand, is within the second class of notes mentioned in the schedule to the 55 G. 3. c. 184, being a note payable in another manner than to bearer on demand, and not exceeding two months after date.

Mayer and Another, Executors of Scott, vs. Whitaker, 1 E. 10 G. 4. Page 409

Where a tradesman, who had supplied goods to a ship, sent in his account to the owner's agent and ship's husband, and took his acceptance at three months, for the amount, deducting discount for that time, which was the usual credit; and when the bill became due, consented to a renewal of it, adding interest; and in like manner took a third acceptance, which was dishonoured, and the agent soon afterwards failed: the balance in his hands, in favour of his principal (the ship owner) having, during all this time, exceeded the amount of the bill, which was, however, unknown to the principal, who had never inspected the agent's accounts: Held, that the tradesman might sue the ship owner for the amount of his claim, and that it was not discharged by the acceptance of the agent. *Robinson v. Read*, 1 E. 10 G. 4. 449

A, B, and C carried on a trade in partnership; and A was also in partnership with D, A being indebted to the firm of A, B, and C before the dissolution of that partnership, unknown to D; indorsed a bill and paid over money (belonging to A and D) in discharge of the private debt due from A to A, B, and C; and immediately afterwards indorsed the same bill to a creditor of the firm of A, B, and C. The partnership between M., B., and C. having been dissolved: Held, that A and D could not maintain trover against B and C for the bill, nor assumpsit for the money paid by A, out of the funds of A and D, to A, B, and C, in discharge of his private debt.

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A. and D. having afterwards become bankrupts, it was held that their assignees could not maintain such actions. *Jones and Others, Assignees, v. Yates and Young, L. 10 G. 3. Page 532*

9. An indorser of a bill of exchange having had an action brought against him by the indorsee, is not entitled to recover from the acceptor the costs incurred in such action. *Dawson v. Morgan, L. 10 G. 4. Page 618*

10. A receiver of the rents of an estate, to a share of which a married woman was entitled, having in his hands money due to her by the direction of the husband, accepted a bill on the faith of that fund, drawn by a creditor of the husband for money lent to him; before the bill became due, the husband and wife gave a joint direction to the receiver to pay over the money to a third person, which he did before the commencement of the action. When the bill became due, the acceptor refused to pay it, unless the drawer would indemnify him against the claim of the husband and wife, to have the money paid according to their order. An indemnity was given, but the acceptor still refused to pay. Held, that the drawer could not maintain an action on the bill, as it would only lead to a circuit of action, as the acceptor, being bound to pay the money according to the order of the husband and wife, might recover it back by suing on the agreement to indemnify. *Carr v. Stephens, T. 10 G. 4. Page 758*

11. Where bills of exchange were delivered by a trader, in contemplation of bankruptcy, to a creditor, with a view of giving him the preference; and the amount due on the bills was re-

ceived by him after the bankruptcy, Held, in an action of trover by the assignees, to recover on the bills, that the receipt of the money by the creditor was not a conversion, (and, therefore, that it was necessary for them to prove a demand and refusal before the bills became due. *Jones and Others, Assignees, v. Fort, L. 10 G. 4. Page 764*

BOND.

See EVIDENCE, 10. INSOLVENT DEBTORS ACT, 1. STAMP, 6.

1. The condition of a bond, given to commissioners of sewers by a collector of rates, was, that the collector should at all times render a faithful account to the commissioners for the time being of all such sums of money as had already been collected or received, or which hereafter should be collected or received by him, by virtue of any rates for and on account of such commissioners, and should pay to the commissioners for the time being all monies already received, or which should hereafter be received by him: Held, that the collector was bound to account for, and pay to the commissioners for the time being, sums of money collected and received by him, by virtue of a rate made by commissioners acting under a commission, which passed before the execution of the bond. *Squanders and Others v. Taylor, 9 to 10 G. 4. Page 85*

2. The condition of a bond, after reciting that the obligor had been nominated treasurer and receiver of the rates and assessments made for the county, upon his giving security to the clerk of the peace for the due and faithful execution of the trusts reposed in him, according to the statute, was, that

that the obligor should, when he was thereto required by the justices of the peace assembled at quarter sessions, or the major part of them, or by any committee of the said magistrates, duly appointed for that purpose, by any order of the said court of quarter sessions now made or hereafter to be made, well and truly account for all sums of money received by him, by reason or on account of his office, and also should faithfully perform, all the trusts reposed in him by virtue of his said appointment: Held, that by the condition of this bond, the county treasurer was bound to account for monies received by him in discharge of duties imposed on him by acts of parliament passed subsequent to the 12 G. 2. c. 29. which required that the county treasurer should give sufficient security to be accountable for the money paid to him in pursuance of that act, and for the due and faithful execution of the trusts reposed in him. *Farr v. Hollis*, H. 9 & 10 G. 4.

Page 315

3. Where (a bond) after reciting that A. B. was colonial secretary of Tobago, and had appointed C. D. to be his deputy, to execute the office and receive the fees, in consideration of his paying thereout to A. B. the annual sum of 450*l.* by equal half-yearly payments, was conditioned for the punctual payment of that sum (without saying "out of the fees"), and defendant pleaded, that the bond was given in pursuance of an agreement to pay that sum at all events; upon which issue was taken, and found for the defendant; Held, that even supposing the agreement to be inconsistent with the language of the bond, it was competent to

the defendant to plead and prove it, in order to shew that the bond was given upon an illegal consideration; and that the fact found by the jury showed that the bond was illegal, and void by virtue of the stat. 40 G. 3. c. 126. *Greville v. Athies and Another*, H. 10 G. 4. 1011. 1012. Page 462

4. When instead of the same sum of money was secured by mortgage deed and by bond, which were executed at the same time, but did not bear the same date, the mortgage deed being impressed with a stamp denoting the payment of the ad valorem duty, and the bond with a stamp of 1*l.* only; it was held that the bond was not properly stamped, and therefore not receivable in evidence. *Wood v. Norton*, T. 10 G. 4. 1011. 1012. Page 885

BROKER'S NOTE.

See STAMP, 4.

BYE LAW.

See CORPORATION, 2.

CANAL.

See POOR RATE, 1. 7.

CAPAS AD SATISFACIENDUM.

See PRACTICE, 2.

CHARITABLE FOUNDATION.

See POOR RATE, 6.

CHARTER.

See CORPORATION, 4.

COALS.

COALS.

The 47 G. B. c. 68. recites, that the several acts then in force for regulating the vend and delivery of coals had been found insufficient to prevent the commission of frauds in the vend and delivery of such coals, and that it would tend greatly to facilitate the execution of the purposes intended by the said acts if the same were repealed, and further and better provisions made for those purposes; and then by section 113. enacts, that the vender of coals sold and sent as and for wharf measure from any ship, &c., or from any wharf, &c. and to be delivered to the purchaser thereof from any cart, &c. shall deliver a printed ticket, and the carman or driver shall deliver the same to the purchaser or his servants before any part of the coals shall be delivered therefrom. It then gives the form of the vender's ticket, which is to contain the number of sacks, the name of the coals sent, &c., the name of the vender, and the name of the labouring meter; and it subjects any vender of coals who shall not deliver such ticket to a penalty of 20l.: Held, that this act made it imperative on the vender of coals to deliver a vender's ticket signed by the meter; and that the act having been passed to protect the buyer against the frauds of the seller, a vender of coals who had delivered a vender's ticket to the purchaser, which was not signed by the meter, could not recover the price of the coals from such purchaser. *Little v. Poole*, H. 9 & 10 G. 4. Page 192

COAL MINES.

See POOR RATE, 4, 5.

COGNOVIT.

See PRACTICE, 70 18.

COLLECTOR.

See BOND, 1.

COLLEGE OF PHYSICIANS.

See PENAL ACTION.

COMMENCEMENT OF ACTION.

See TRESPASS, 2.

COMMISSIONERS OF BANKRUPT.

See BANKRUPT, 3.

COMMISSIONERS OF SEWERS.

See BOND, 1.

COMMITMENT.

See JUSTICE, 1.

COMMON.

See EVIDENCE, 14. TRESPASS, 4.

COMPENSATION.

See TITHES.

COMPOSITION DEED.

See DEED, 1. EVIDENCE, 10.

CORPORATION.

See SELECT VESTRY, 1.

1. To a mandamus to the lord mayor and aldermen of London

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to admit and swear in *A. B.* to the office of alderman, they returned certain proceedings towards an election at a wardmote court, when *A. B.* was declared to be elected, and a return thereof made to the court of lord mayor and aldermen, and that that court has had from time immemorial cognizance and jurisdiction to enquire into and adjudicate upon all elections at wardmote courts to city offices, upon the petition of any party interested; that petitions by several parties interested, were presented against the return of *A. B.*; that the merits were enquired into, and the election declared null and void by the said court of lord mayor and aldermen; and that *A. B.* was not duly elected, wherefore, &c. Traverse of the allegation, that *A. B.* was not duly elected. At the trial of the issue, it appeared, that at first the lord mayor appointed three clerks to take the poll; but on the second day, he dismissed two of them. After the number of votes was declared, a scrutiny was demanded, and granted, and then the lord mayor dismissed the suitors at the wardmote, to meet again upon a fresh summons. After this the lord mayor went out of office, and his successor issued a fresh summons for holding a wardmote, and there took the scrutiny, and declared *A. B.* duly elected, which was returned to the court of lord mayor and aldermen; who, upon petitions being presented, declared the election void, as stated in the return. Upon a special case, stating these facts, it was held, first, that the return was good in form; secondly, that the custom set out for the lord mayor and

aldermen to enquire into and adjudicate upon elections did not oust the jurisdiction of this court; thirdly, that the election was not invalid on account of the dismissal of two of the poll-clerks, or the change of the presiding officer; lastly, that the wardmote court was not dissolved, but only adjourned; by the dismissal of the suitors to meet again on a fresh summons. *The King v. The Mayor and Aldermen of the City of London*, *H. 9 & 10 G. 4*. *Page 1*
 2. A bye-law, that no person shall exercise the art of a painter within the city of London, not being free of the company of painters, is a bye-law in restraint of trade, and void, unless there be a special custom to warrant it. *Clark v. Le Cren*, *H. 9 & 10 G. 4*. *Page 1*
 3. In the borough of *W.* the town clerk is appointed by the mayor, aldermen, and bailiffs, to hold the office during their pleasure, with a salary, which they have power to alter in amount or withdraw altogether; and one of the town clerk's duties is to attend all corporate meetings of the mayor, aldermen, bailiffs, and burgesses, and draw up minutes of their proceedings under their inspection. Held, that the offices of alderman and town clerk are incompatible, and that an alderman, by accepting the latter, vacated the former office. *The King v. Tizzard*, *E. 10 G. 4*.

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4. By a charter of Queen Elizabeth, it was provided that vacancies in the common council of the borough of *L.* should be filled up by election out of the "burgesses and inhabitants." The charter was accepted, but the corporation afterwards elected

ed burgesses, not being inhabitants, to the office of common councilmen, as they had done before. This charter, and all other franchises, were surrendered to *Car. II.* and *W. & M.* by a charter of restoration granted that the corporation should enjoy all franchises, elections, rights of election, &c. that they had previously enjoyed by virtue or pretence of any charter, or by any other lawful manner, right, or title. Held, that under the charter of *Elizabeth*, burgesses could not be elected to be common councilmen, unless they were inhabitants; and that an usage to elect burgesses not inhabitants was repugnant to the charter, and could not be pleaded in explanation of it. Held, also, that the charter of *W. & M.* only restored such rights as had been lawfully exercised under or by pretence of former charters, and, therefore, did not enable the corporation to elect burgesses, not being inhabitants, to the office of common councilmen. *The King v. Salway*, *R.* 10 G. 4. Page 424.

5. Where a rule is obtained for a *que warranto*, upon the ground that a party has vacated a corporate office by having accepted a second incompatible office, the affidavits must shew a valid appointment to the second office, the acceptance of which is made the ground of a motion. *The King v. Day*, *T.* 10 G. 4. 702.

COSTS.

See BILL OF EXCHANGE, 9. EXECUTOR, 4, 5. PENAL ACTION, 2. PLEADING, 5. PRACTICE, 15. WELSH JUDICATURE ACT.

COUNTY TREASURER.

See, TREASURER, 2.

COVENANT.

1. Where a lease of an undivided third part of certain mines contained a recital of an agreement made by the lessee with the lessor, and the owners of the other two thirds, for pulling down an old smelting mill and building another of larger dimensions, and the lease contained a covenant to keep such new mill in repair and so leave it at the expiration of the term, but did not contain a covenant to build it. Held, that such a covenant was to be implied, and that the lessor of the one third might sue upon it in respect of his interest.

The lease contained a demise of all mines and minerals then opened or discovered, or which might, during the term, be opened or discovered in or under certain moors and waste lands, and also all smelting mills then standing upon the said lands, with full liberty to sink shafts there, and to build thereon any mills or other buildings requisite for working the mines; habendum the said demised premises with the appurtenances for twenty-one years. The lessor afterwards granted his reversion of and in the said demised premises with the appurtenances to *G. B.*, who by will devised the same to the plaintiffs. Held, that the covenant to build the new smelting mill tended to the support and maintenance of the thing demised, and that the assignee of the reversion might therefore sue upon

upon it. *Sampson and Another v. Easterby*, E. 10 G. 4.

Page 805

2. The assignor of a lease of a public-house in *London* covenanted that he would not keep a public-house within the distance of half a mile from the premises assigned: Held, that the half mile, as mentioned in the covenant, imported half a mile measured by the nearest way of access between the premises assigned and any public-house afterwards kept by the assignor. *Leigh v. Hind*, T. 10 G. 4. 774

COURT MARTIAL.

A purser in the navy is liable by the 22 G. 2. c. 39 to be tried by a court-martial for fraudulently and unlawfully charging blankets against seamen to whom none had been issued; and of making, in order to such charge, certain false entries in one of the ship's books, that being, within the thirty-sixth article of war, an offence not capital committed by any person in the Fleet, not mentioned in the act, and for which no punishment is thereby directed to be inflicted. *Mann v. Owen and Others*, E. 10 G. 4.

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CUSTOM.

See CORPORATION, 2.

DAMAGES.

See ARBITRAMENT, 5.

DEBT.

See PLEADING, 3.

DECLARATION.

See PRACTICE, 9.

DEED.

DEED.

See EJECTMENT, 1.

1. By a composition-deed, the insolvent assigned to four trustees all his goods, chattels, &c., upon trust to sell and to apply the proceeds rateably in discharge of his debts amongst his creditors, who should execute the deed; provided that the trustees and the creditors should, on or before a given day, make proof of the debts (if required), and execute that deed. The creditors, as a release of their respective debts, covenanted that they would not implead the insolvent or his goods. The deed was executed by two only of the trustees: Held, that the deed was not therefore void; and that the debt of a trustee who had executed it was thereby extinguished, and that he could not sue out a commission of bankruptcy. *Small v. Marwood*, H. 9 & 10 G. 4. Page 300
2. A rector, in 1814, and after the 13 Eliz. c. 20. had been repealed, in consideration of 600*l.*, granted, bargained, and sold the rectory and glebe lands, and all tithes, &c. for 100 years, to the grantee of an annuity for securing the same. After the passing of 57 G. 3. c. 99., by deed, reciting the grant of the annuity, and that A. B. had agreed to lend the rector 600*l.* to enable him to redeem the annuity, the grantee of the same, in consideration of 600*l.*, by direction of the rector, assigned to A. B. the 600*l.* by him paid for the purchase of the annuity, and term; and the rector confirmed to A. B. the rectory for the purpose of securing the repayment of the sum advanced by him to redeem the annuity, as well as other sums: Held, that inasmuch as the term was created

created after the passing of the 43 G. 3. c. 84. which repealed the 13 Eliz. c. 20. against charging benefices, the assignment of it, for the purpose of securing the money paid as the consideration of the annuity, was valid, and vested the legal estate in *A. B.*, although made after the 57 G. 3. c. 99., which, perhaps, revived the 13 Eliz. c. 20., so far as related to charges upon benefices. *Doe dem. Broughton and. Another v. Gully*, H. 9 & 10 G. 4. Page 344

3. By a deed whereby a joint stock company was established, any shareholder desirous of transferring his shares was to give notice at the office of the company that he had agreed to sell the shares, and no person who purchased shares, was to be deemed a proprietor, until he executed the deed. The directors on notice of the transfer of any shares (made in conformity to the rules of the company) were to cause the transfer to be registered in the books of the company. Every person by whom such shares were transferred was immediately after such transfer was registered in the books of the company to cease to be a proprietor. In an action, in which the plaintiff sought to charge the defendant, as a member of the company for goods sold, &c., the letters of the plaintiff, in which he admitted himself to be a shareholder, on the 30th of March 1826, were held to be proof of that fact, although it was not proved that he had ever executed the deed; secondly, there being no proof of any actual transfer of the shares to a purchaser, or of the execution of the deed by him, an entry in the books of the company of a transfer to a purchaser on the 28th of March was held

not to be evidence that the plaintiff had then ceased to be a partner, or if it was *prima facie* evidence of that fact, it was rebutted by the letters of the plaintiff of a subsequent date, admitting himself to be a partner. *Harvey and Others v. Kay, Bart.*, H. 9 & 10 G. 4. Page 356

DEMISE.

See LANDLORD AND TENANT, 2.

DEPOSIT.

See ASSUMPSIT, 6.

DEVISE.

1. Testator, by his will, devised to his daughter *Elizabeth*, the widow of his late son *T. M.*, part of a messuage, or tenement therein described, to hold to her and her assigns for and during the term of her natural life, if she should so long continue a widow and unmarried; and from and after her decease or day of marriage, which should first happen, he gave and devised the premises before given to his wife, and also other real property therein mentioned, unto the four children of his late son *T. M.*, deceased, in fee: Held, that by this devise the children of *T. M.* took no estate in any part of the property devised till after the death of *Elizabeth*; and, consequently, that one of them, a pauper, who came during the lifetime of his mother to reside in the parish where the lands not given to *Elizabeth*, in like manner, were situate, gained no settlement by estate. *The King v. the Inhabitants of Ringstead*, H. 9 & 10 G. 4. 218
2. Testator being seized in fee of lands in which he had a beneficial interest, and also of other lands,

as mortgagee, after giving a portion of his real estate, and charging his whole real estate with the payment of several annuities and pecuniary legacies, devised all his lands, &c. unto trustees, their heirs, and assigns, until *W. E. S.* should attain his age of twenty-one years, or in case of his death before twenty-one without leaving issue male, until his sister *M.* should attain her age of twenty-one years, in trust, to dispose of the rents and profits as thereafter declared; and as soon as *W. E. S.* attained the age of twenty-one years, testator devised to him all his lands, &c. for life, remainder to trustees to preserve contingent remainders, in trust, to permit *W. E. S.* to receive the rents for life, and after his decease, to his first and other sons in strict settlement, and in default of issue, to *M.* his sister for life, with similar limitations to her first and other sons; provided *W. E. S.*, or *M.*, or her future husband, should assume the surname of the testator.

By the residuary clause testator bequeathed all his stock in trade, cotton-mills, machinery, cupola-furnace, mineral tools, implements, and utensils, ready money, and securities for money, debts, personal estate, and effects of what nature or kind soever, to his executors, upon trust that they, or the survivors of them, or the heirs, executors, administrators, or assigns of such survivors, should sell the same, and invest the produce in the purchase of freehold estates: Held, that the legal estate in the mortgaged property did not pass to the executors under the clause first above mentioned; because, although the words there used were sufficient to pass such pro-

erty, the testator had subjected the property thereby devised to limitations, inapplicable to mortgaged property: Held, secondly, that it did not pass under the residuary clause; because the words securities for money, as there used, were not sufficient to pass such property. *Gallie v. Moss*, 11 F. 9 & 10 C. 41. Page 967
31 Testator devised to his executors, their heirs and assigns, his lands, upon trust to sell the same; and directed that the money arising from the sale should be deemed part of his personal estates; and that it should be subject to the disposition made concerning his personal estate. He then directed his personal estate to be sold; and when the money arising from the sale of his personal and real estate should be collected, he disposed of it in the manner mentioned in the will, and among other dispositions he bequeathed a legacy to *A. B.*: Held, that the money arising from the sale of the real estate was equitable assets, and that a legatee could not maintain a suit in the ecclesiastical court to recover his legacy. *Barker v. May*, and *Others*, 10 Gr. 409. 489

DIES NON.

See PRACTICE, 3.

EJECTMENT.

1 By an order of the Court of Chancery made in a suit depending between the lessee and lessor, the lease was deposited in the hands of the lessor's attorney, the lessee being at liberty to inspect the same. Upon ejectment brought by the lessee against the tenant in possession, it was held, that the attorney of the lessor was bound to produce the lease, it

it, not being part of the lessor's title. The lease, when produced, appeared to have the names of the parties torn off. Held, that that was not a surrender by operation of law, nor prima facie evidence of a surrender by deed or note in writing, and that the lease was evidence of the lessee's title. It appeared, that before the lease was granted, the demised premises were settled for life on A., with power to charge the estate with an annuity for any husband she might marry, and portions for younger children, and power to grant leases for twenty-one years, and that she granted, bargained, sold, demised, limited, and appointed the same to trustees for the term of 500 years upon trust that they should, (if she should by deed so direct and appoint), by mortgage or sale of the said premises for the whole or any part of the term of 500 years, raise portions for younger children: Held, that, taking the whole deed together, the term, until it was called into action, was subservient to the leasing power; and that an ejectment brought by a lessee, holding under a lease granted subsequently to the deed of settlement, the term for 500 years was no answer. *Doe on the demise of Courtail v. Thomas*, H. 9 & 10 G. 4. Page 288

2. In ejectment for a forfeiture incurred by using rooms in a house in a manner prohibited by the lease; Held, that such user was a continuing breach, and that the landlord was not, by receiving rent, precluded from taking advantage of the forfeiture, provided the user continued after such receipt of rent. *Doe dem. Ambler v. Woodbridge*, E. 10 G. 4.

3. By a local enclosure act it was provided, that whenever the office of a commissioner should become vacant, the lord of the manor, with the major part in value of the proprietors of lands in and common rights in the parish (such value to be ascertained according to their respective assessments in the last rates made for the relief of the poor in the said parish) present at a public meeting, should elect another. And by another clause, that out of the lands to be allotted, the commissioners should allot a part, in their judgment sufficient, when sold, to defray the expenses of carrying the act into effect; and if it should prove insufficient, the deficiency should be made up by the persons interested in the lands to be enclosed, and should be paid in such proportions; and at such times, as the commissioners should direct. And by another clause, it was enacted, that the commissioners should once a year lay their accounts before a justice of the peace, and get them allowed by him, and that no charge or item in such account should be binding on the parties concerned, nor valid in law, unless the same should have been duly allowed by such justice; and an appeal was given against the accounts or rates to be made by the commissioners. The office of commissioner having become vacant, a new one was elected by the lord of the manor and the major part in value of the proprietors of lands at a public meeting. No one there disputed that he had such majority, but no reference was made to the poor rates: Held, that nevertheless the appointment was valid.

The commissioners having set apart and sold a portion of the lands to be allotted, in order to defray expenses, found that there was a deficiency, and made a rate upon the parties interested, in order to provide for that deficiency. One of those parties having refused to pay: Held, that the commissioners might bring ejectment under the twentieth section of the general enclosure act, 41 G. 3. c. 109, to recover the land allotted to him in respect of which the rate was imposed.

The commissioners, instead of laying their accounts before a justice annually, had done so only twice in fourteen years, and had not done so for several years before the rate was made; but there never was any appeal against the accounts or the rate: Held, that the commissioners had power to make such rate, notwithstanding their neglect in passing their accounts. *Doe dem. Harris and Cheese v. Bodenham and Another*, 5. 10 G. 4. Page 495

ELECTION.

See CORPORATION, 1.

ENTIRE CONTRACT.

See VENDOR AND VENDEE, 8.

EQUITABLE ASSETS.

See DEVISE, 3.

ESTOPPEL.

See BANKRUPT, 7.

EVIDENCE.

EVIDENCE.

See STAMP, 4. TRESPASS, 4.
VENDOR AND VENDEE, 9.

1. Where the drawer of a bill of exchange made it payable at his own house: Held, that the jury might fairly infer that it was an accommodation bill, which made it unnecessary to give him notice of non-payment by the acceptor. *Sharp v. Bailey*, H. 9 & 10 G. 4. Page 44

2. A Bank of England note, which had been feloniously stolen in England in February 1826, was remitted, in May 1827, by a foreign merchant to his correspondent in this country, to whom he was indebted in a sum exceeding the amount of the note. The latter demanded payment; the Bank refused to pay, on the ground that the note had been stolen. At the time when the correspondent was informed of this, he had not made the foreign merchant any advance on the credit of the note: Held, first, that in trover for the note, the correspondent must be considered the agent of the foreign merchant, and that he could, therefore, recover upon his title only.

Secondly, that in such action, it having been proved that the note had been stolen, it was incumbent on the plaintiff to show that the foreign merchant had given full value for it. *De la Chaumette v. The Bank of England*, H. 9 & 10 G. 4. 208

3. By a contract for the sale of cinq foins seed, the vendor warranted it to be good new growing seed. Soon after the sale, the buyer

buyer was told that it did not correspond with the warranty; and he afterwards sowed part, and sold the residue. Held, that, in answer to an action by the seller to redouble the price of the seed, it was competent to the buyer to shew that it did not correspond with the warranty. *Roulton v. Lattimore*, H. 9 & 10 G. 4. Page 259

4. By an order of the Court of Chancery, made in a suit depending between the lessee and lessor, the lease was deposited in the hands of the lessor's attorney, the lessee being at liberty to inspect the same. Upon ejectment brought by lessee against the tenant in possession; it was held, that the attorney of the lessor was bound to produce the lease, it not being part of the lessor's title.

The lease, when produced, appeared to have the names of the parties torn off. Held, that that was not a surrender by operation of law, nor *prima facie* evidence of a surrender by deed or note in writing, and that the lease was evidence of the lessee's title. *Doe on the demise of Courtain v. Thomas*, H. 9 & 10 G. 4. 288

5. By a deed, whereby a joint stock company was established, any shareholder desirous of transferring his shares was to give notice at the office of the company that he had agreed to sell the shares, and no person who purchased shares was to be deemed a proprietor until he executed the deed. The directors, on notice of the transfer of any shares (made in conformity to the rules of the company), were to cause the transfer to be registered in the books of the company. Every person, by whom such shares were trans-

ferred, was, immediately after such transfer was registered in the books of the company, to cease to be a proprietor. In an action in which the plaintiff sought to charge the defendant, as a member of the company, for goods sold, &c., the letters of the plaintiff, in which he admitted himself to be a shareholder on the 30th of March 1826, were held to be proof of that fact, although it was not proved that he had ever executed the deed. Secondly, there being no proof of any actual transfer of the shares to a purchaser, or of the execution of the deed by him, an entry in the books of the company of a transfer to a purchaser on the 28th of March was held not to be evidence that the plaintiff had then ceased to be a partner; or if it was *prima facie* evidence of that fact, it was rebutted by the letters of the plaintiff of a subsequent date, admitting himself to be a partner. *Harvey and Others v. Ray, Bart.*, H. 9 & 10 G. 4.

Page 356

6. When a bill of exchange became due, it was agreed between the drawer and acceptor that it should be renewed; and on the back of the bill another instrument for the same value was drawn, and accepted by the same parties, but it was not stamped. At the same time the name of the acceptor was erased from the first bill. In an action on that bill, the Judge left it to the jury to find whether it had been cancelled with the consent of the drawer, and the unstamped instrument was submitted to the view of the jury; they having found that the bill was cancelled with the consent of the drawer, this Court made a rule for a new trial

trial absolute, on the ground that the jury ought not to have been permitted to draw a conclusion of fact from the unstamped instrument. *Sweeting v. Halse, H. 9 & 10 G. 4.* Page 965

7. In an action for a libel contained in a newspaper: Held, that the publication was proved by the production of a newspaper corresponding in title, &c., with that described in the affidavit lodged at the stamp office. *Maitland v. Fletcher, E. 10 G. 4.* Page 382

8. Where it was proved that A. B. had contributed to the funds of a building society, and had been present at a meeting of the society, and party to a resolution that certain houses should be built: Held, that this made him liable to an action for work done in building those houses, without proof that he had any actual interest in them, or in the land on which they were built. *Brinkman and Others v. Skelford, E. 10 G. 4.* Page 401

9. In an action for libel, it appeared that the defendant, with whom the plaintiff had lived as servant, in answer to enquiries respecting her character, wrote a letter, imputing misconduct to her whilst in that service, and after she left it; and the defendant also made similar parol statements to two persons that had recommended the plaintiff to her: Held, that neither the letter itself, nor the parol statements proved malice, and that, consequently, the letter was a privileged communication, and the plaintiff not entitled to recover. *Child v. Affleck et. Ux., E. 10 G. 4.* Page 403

10. To debt, on bond, defendant pleaded, that, after the bond was executed, he became bankrupt; that nine tenths of the creditors assembled at two meetings, called

pursuant to the 6. G. 4. c. 16. v. 138, had agreed to accept a composition, whereupon the commission was superseded, and that he had been always ready, and offered, to pay the composition to the plaintiffs, but did not aver that the plaintiffs were present at the meetings, or had agreed to take the composition, as he had proved under the commission: Held, that the plea was not an answer to the action.

Defendant further pleaded, that before the bond was executed he was indebted to M. J. and various other persons, and being insolvent, agreed with them to pay a composition, and they agreed to release him. That several creditors, relying on that agreement, executed a release. That plaintiffs afterwards, as trustees for M. J., obtained and accepted for the residue of the debt the bond in question, by fraud and covin, without the knowledge or consent, and in fraud of the other creditors. Replication, that the bond was not obtained by fraud, and covin as alleged. The jury, having found this issue for the defendant, judgment non obstante verdicto was entered up in C.P.: Held, on writ of error, that the facts alleged did not show fraud and covin, inasmuch as it did not appear that the giving of the bond was connected with the agreement for the composition, and that the defendant could not give evidence of any other fraud but that which he had averred. *Tuck v. Toke (in Error), E. 10 G. 4.* Page 437.

11. Where a bond, after reciting that A. B. was colonial secretary of Tobago, and had appointed C. D. to be his deputy, to execute the office and receive the fees, in consideration of his paying

ing thereout to A. B. the annual sum of 450*l.* by equal half-yearly payments, was conditioned for the punctual payment of that sum (without saying "out of the fees") and defendant pleaded that the bond was given in pursuance of an agreement to pay that sum at all events upon which issue was taken, and found for the defendant. Held, that even supposing the agreement to be inconsistent with the language of the bond, it was competent to the defendant to plead and prove it, in order to show that the bond was given upon an illegal consideration; and that the fact found by the jury showed that the bond was illegal and void by virtue of the statute 19 G. 3. c. 126. *Greville v. Atkins and Another, Executor and Executrix*, E. 10 G. 4. Page 462

12. Upon an indictment founded on the statute 21 Jac. 1. c. 15. or 8 Hen. 6. c. 9. whereby justices are empowered to give restitution of the possession of the lands entered upon by force, or holden by force, to the respective tenants thereof; the tenant, whose land has been entered upon, or withheld by force, is not a competent witness. *Ret v. Williams*, E. 10 G. 4. Page 549

13. In an action brought to charge A. as a partner to a trading company, a witness, who by other evidence than his own, appeared to be a shareholder in the company, was held to be competent to prove that A. was a partner. *Hall v. Curzon*, T. 10 G. 4. Page 646

14. Trespass for breaking and entering the plaintiff's close, and treading down the grass, &c., and breaking and destroying the hedges and fences of the plaintiff, &c. The defendant, as to all the

trespasses, pleaded that the plaintiff's close was parcel of the manor of C., and that a certain messuage and four acres of land, with the appurtenances, at the said several times when, &c. were, and from time immemorial had been, within and parcel of the said manor and a customary tenement of that manor; and that within the said manor there was, and from time whereof, &c. there had been, an ancient custom that every customary tenant of the said customary tenement with the appurtenances should have common of pasture upon the plaintiff's close. That J. S. being seised of the said customary tenement, having occasion to use his common of pasture, entered the close in which, &c. and put his cattle in; and because the hedges and fences had been improperly erected, defendant threw them down. Replication, denying the custom for the customary tenant of the said customary tenement to have common of pasture, upon which issue was joined. Plea second, a prescriptive right of common of turbary in respect of said customary tenement consisting of a messuage and lands. Replication, denying the custom, in respect of such said customary tenant, upon which issue was joined, and new assignment that the defendant entered for other purposes than those mentioned in the plea. It appeared in evidence that at the time of the plea pleaded, there was an ancient customary tenement, consisting of a dwelling-house and out buildings, garden and a small quantity of land, the customary tenant whereof had immemorially enjoyed such common of pasture in the plea mentioned, that

for many years the defendant had been such customary tenant, and in 1812 had built a new dwelling-house on a part of the garden; that both the old and new dwelling-house continued to be occupied till 1823, when the former fell into decay and was abandoned by the tenant, and then remained unoccupied until it was finally pulled down in 1825; from which time there had been no dwelling-house on the tenement, except the one built by the defendant in 1821. During the years in which both the old and new dwelling-houses were unoccupied, the tenant of the former continued to exercise such customary rights on the wastes of the manor in respect thereof as he had before and during that period. It did not appear that the occupier of the latter had exercised any customary rights on the wastes of the manor in respect thereof; but, since the new dwelling-house had been alone occupied, the customary tenant of the tenement had claimed and enjoyed all the same rights in respect thereof as had been claimed and enjoyed at any former period; and, amongst others, the customary right stated in the second plea: Held, that upon this evidence the defendant was entitled to have the issue joined upon the right of common of pasture found for him, in respect of an ancient customary tenement.

It appeared, that the defendants committed one trespass, by breaking down a large portion of the fence which was standing upon the plaintiff's close, which the plaintiff had then newly erected upon the common, and that the defendants did so, really intending to assert and preserve their rights of common of pasture and of turbary; but that they broke

down much more of the fence than was necessary for the convenient ingress and egress of men and commonable cattle into and upon that part of the close which was enclosed by the fence; and that they did not intend, at the time of committing the trespass, to exercise any of the said rights of common, nor had they with them any commonable cattle: Held, that upon this evidence the defendants were entitled to have the issue found for them upon the plea of not guilty to the new assignment.

Quere, whether the defendants were entitled to have the issue, on the right of common of turbary, found for them in *Atlett and Others v. Ellis*, T. 10, G. 4.

15. In an action on a policy on a voyage from Liverpool to a blockaded port, it was proved that the vessel sailed from G. on the voyage before the blockade was notified in this country, but afterwards put into another port in this kingdom, after such notification in the London Gazette, and when the blockade might be known there. The jury found that the captain did not know of the blockade: Held, that the knowledge of the captain was not to be presumed, on the principle that notice to a state was notice to all the subjects of that state, but that it was a question of fact for the consideration of a jury. *Harrott and Another v. Wise*, T. 10 G. 4. 712

16. Evidence of a trading which ceased before the 6. Geo. 4. c. 16. took effect, will not support a commission of bankrupt issued after that time. *Surtees and Another, Assignees, v. Ellison*, T. 10 G. 4. 750

Hewson v. Heard, *ibid.* 754

Palmer v. Moore, *ibid.* 754

17. Where

17. Where a case was removed by habeas corpus from an inferior court after judgment by default, that judgment is not evidence against the defendant in the superior court. *Bottings v. Firby and Humphry*, T. 10 G. 4.

Page 762

18. Where bills of exchange were delivered by a trader in contemplation of bankruptcy to a creditor with a view of giving him the preference, and the amount due on the bills was received by him after the bankruptcy: Held, in an action of trover by the assignees to recover the bills, that the receipt of the money by the creditor was not a conversion; and, therefore, that it was necessary for them to prove a demand and refusal before the bills became due. *Jones and Others, Assignees, v. Fort*, T. 10 G. 4.

764

19. Possession of land for any time less than twenty years by a feoffee, is not presumptive evidence of livery of seisin.

An indorsement on the feoffment, purporting to have been made by the attorney thereby appointed to deliver seisin, that he had done so in the presence of A., is not evidence of that fact, although the deed is produced by the defendant at the desire of the plaintiff, unless the defendant claims under it. *Doe on the Demise of Wilkins v. the Marquis of Cleveland and Another*, T. 10 G. 4.

864

20. Where one and the same sum of money was secured by mortgage deed and by bond, which were executed at the same time, but did not bear the same date; the mortgage deed being impressed with a stamp denoting the payment of the ad valorem duty, and the bond with a stamp of 1l. only; it was held that the bond

was not properly stamped, and, therefore, not receivable in evidence. *Wood v. Norton*, T. 10 G. 4.

Page 885

21. Relief given to a pauper not residing in the relieving parish, is prima facie evidence of his being settled there; but the sessions are not bound upon such evidence only, to find that he is settled in the relieving parish; and, therefore, when upon the trial of an appeal the pauper proved relief given to him by the appellat parish, whilst resident in another parish, the sessions having quashed the order of removal, the Court of King's Bench refused to disturb the decision. *The King v. The Inhabitants of Yatwell*, T. 10 G. 4.

894

22. In an action of trover brought to recover the value of the goods distrained, on the ground that the defendant was not plaintiff's landlord, plaintiff proved payment of rent to another person. The defendant tendered in evidence accounts rendered to him by that person, to show that he had accounted for the very rents received from the plaintiff: Held that the accounts were not admissible in evidence, the person who rendered them being alive and capable of being a witness, and not identified in interest with the plaintiff. *Spargo v. Brown*, T. 10 G. 4.

936

EXECUTOR.

1. Where the payee and holder of a promissory note appoints the maker his executor, the debt is discharged, and no action can be maintained on the note, even by a person to whom the executor has endorsed it. *Frackley v. Fox*, H. 9 & 10 G. 4.
2. Where the proprietor of stock in the public funds makes a specific

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bequest

bequest of it. Held, that the Bank of England must nevertheless allow the executor to make a transfer of it, unless it be shown that he has assented to the legacy. *Franklin v. The Bank of England*, 9 & 10 G. 4. Page 156

3. Where a man, who had for some years cohabited with a woman that passed for his wife, went abroad, leaving her and her family at his residence in this country, and died abroad: Held, that the woman might have the same authority to bind him by her contracts for necessaries as if she had been his wife; but that his executor was not bound to pay for any goods supplied to her after his death, although before information of his death had been received. *Bladen v. Frell*, 9 & 10 G. 4. Page 167

4. Assumpsit against an executor on promises by the testator. Pleas, non assumpsit, and plene administravit. Plaintiff joined issue, and went to trial, and obtained a verdict on the plea of non assumpsit, and took judgment of assets quoad omnia the plea of plene administravit. Held, that he was entitled to judgment for the costs to be levied de bonis propriis of the executor, if there were not assets of the testator sufficient to satisfy them. *Marshall and Another, Executors and Administrators v. Widdler* (an Error), 10 G. 4. Page 655

5. Plaintiff sued as administratrix, upon promises to the intestate, and upon an account stated with her as administratrix, of monies due to him in that character, and a promise to pay her. Held, that it thereby appeared that the contract was one made between the plaintiff and another person within the words of the stat. 28 Hen. 8. c. 15., and, therefore, that after a nonsuit the defendant was entitled

FRAUDS, STATUTE OF.

9918 as an agent, and to make a contract. *Dowbiggin v. Administration of Harrison*, 10 G. 4. Page 666

EXECUTION.

See *SHERIFF*, 10 G. 4. Page 661

FEME COVERT.

See *SHERIFF*, 10 G. 4. Page 661

1. Where a man, who had for some years cohabited with a woman to that passed for his wife, went abroad, leaving her and her family at his residence in this country, and died abroad: Held, that the woman might have the same authority to bind him by her contracts for necessaries, as if she had been his wife; but that his executor was not bound to pay for any goods supplied to her after his death, although before information of his death had been received. *Bladen v. Frell*, 9 & 10 G. 4. Page 167

FEOFFMENT.

See *EVIDENCE*, 10 G. 4. Page 661

FORCIBLE ENTRY.

See *INDICTMENT*, 10 G. 4. Page 661

FOREFEITURE.

See *EJECTMENT*, 2. 10 G. 4. Page 661

FORGERY.

See *ASSUMPSIT*, 10 G. 4. Page 661

FRAUDS, STATUTE OF.

See *EVIDENCE*, 10 G. 4. Page 661

1. A contract, whereby a coach-maker agreed to let a carriage for a term of five years, in consideration of receiving an annual payment for the use of it, but which, by the custom of the trade, is determinable at any time within that period upon the payment

ment of a year's hire, is an agreement not to be performed within a year, within the meaning of the statute of frauds, and, therefore, must be signed by the party to be charged therewith. *Birch v. The Earl of Liverpool*, E. 10 G. 4. Page 393

2. A. being the owner of trees growing on his land, verbally agreed with B., while they were standing, to sell him the timber at so much per foot. B. afterwards offered to sell the bolls of the trees to a third person; and said he would convert the tops into building-stuff. A. afterwards by letter, required B. to pay for the timber which he, (B.), had bought of him. B. wrote a letter in answer, stating that he had bought the timber, but that he had bought it to be sound and good, and that it was not so: Held, first, that the contract was not a contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning the same, within the meaning of the fourth section of the statute of frauds, but that it was a contract for the sale of goods, wares, and merchandizes, within the seventeenth section.

Secondly, that as the purchaser did not, in his letter, recognise the absolute contract described in the vendor's letter, but stated a conditional one as to quality, there was no note in writing of the bargain to satisfy the statute of frauds.

Thirdly, that there had been no part-acceptance or actual receipt of the goods to satisfy the statute, inasmuch as there was nothing to shew that the purchaser had divested himself of his right to object to the quality of the goods, or that the seller had lost his lien for the price. *Smith v. Burman*, E. 10 G. 4. 561

GAME.

An unqualified person going out with a qualified person, as his servant, and shooting game for him, is liable to the penalty imposed by the 5 Ann. c. 14. for keeping and using a gun to kill game. *Ex parte Sylvester*, H. 18 & 9 G. 3. 1. Page 61

GUARDIANS OF THE POOR.

See PARISHIONER.

HABEAS CORPUS.

See EVIDENCE, 17.

HIGHWAY ACT.

See TITHES, 1.

HIGHWAY.

By a local act for better governing and regulating the parish of *Puddington*, it was enacted, that no road which had not been repaired by the parish, should be repaired out of the parochial funds, until such road should have been surveyed by two surveyors, and certified by them to have been properly formed, constructed, mended, and drained; one of the surveyors to be appointed by the vestry, and one by the freeholder and his lessee. A road had been set out by the proprietors, for the purpose of letting the frontage of 5660 feet, as building ground; eight houses had been built and were inhabited, and twenty-six carcasses erected. The road had been formed, constructed, made, and drained, and used by the public for six months, and the freeholder and his lessee had appointed a surveyor, and required the vestry to appoint one, which they refused to do. The court, in the exercise of its discretion, refused to grant a mandamus to the vestry to compel them

them to appoint a surveyor; inasmuch as such appointment would have the effect of throwing on the parish the burden of repairing a road which would be, under the circumstances, not merely for the benefit of the public, but for the benefit of the freeholder during the time his buildings were erecting. *The King against the Paddington Vestry*, E. 10 G. 4.

Page 456

HUNDRED, ACTION AGAINST.

1. In an action against the hundred, on the 9 G. 1. c. 22., to recover damages for the injury done to premises maliciously set on fire: Held, first, that a reversioner may sue for the injury which he has sustained.

Secondly, that if no servant of his has the care of the premises, he is the proper person to give in the examination.

Thirdly, that he is not bound in such examination to state his suspicions as to the offender.

Fourthly, that the two days allowed by the statute for giving notice of the offence are exclusive of the day on which the fire happens. *Pellow v. The Inhabitants of the Hundred of Wonford*, H. 9 & 10 G. 4. 134

INCLOSURE ACT.

1. By a local inclosure act it was provided, that whenever the office of a commissioner should become vacant, the lord of the manor, with the major part in value of the proprietors of lands and common rights in the parish (such value to be ascertained according to their respective assessments in the last rates made for the relief of the poor in the said parish), present at a public meeting, should elect another. And by

INCLOSURE ACT.

another clause, that out of the lands to be allotted the commissioners should allot a part, in their judgment sufficient, when sold, to defray the expenses of carrying the act into effect; and if it should prove insufficient, the deficiency should be made up by the person interested in the lands to be inclosed; and should be paid in such proportions, and at such times, as the commissioners should direct. And by another clause it was enacted, that the commissioners should once a year lay their accounts before a justice of the peace, and get them allowed by him; and that no charge or item in such account should be binding on the parties concerned, or valid in law, unless the same should have been duly allowed by such justice; and an appeal was given against the accounts or rates to be made by the commissioners.

The office of commissioner having become vacant, a new one was elected by the lord of the manor and the major part in value of the proprietors of lands at a public meeting. No one there disputed that he had such majority, but no reference was made to the poor rates: Held, that nevertheless the appointment was valid.

The commissioners having set apart and sold a portion of the lands to be allotted, in order to defray expenses, found that there was a deficiency, and made a rate upon the parties interested, in order to provide for that deficiency. One of those parties having refused to pay: Held, that the commissioners might bring ejectment under the twenty-ninth section of the general inclosure act, 41 G. 3. c. 109., to recover the land allotted to him in respect of which the rate was imposed.

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The commissioners, instead of laying their accounts before a justice annually, had done so only twice in fourteen years, and had not done so for several years before the rate was made; but there never was any appeal against the accounts or the rate: Held, that the commissioners had power to make such rats, notwithstanding their neglect in passing their accounts. *Doe on the demise of Harris and Another v. Bodenham and Another, E. 10 G. 4.* Page 495

2. A tenement was granted by the dean and chapter of *W.*, lords of the manor of *W.*, by copy of court roll to *J. S.*, *T. P. S.*, and *J. W. S.*, habendum for the term of their lives, and the life of every and either of them longest living, successively, according to the custom of the manor. *J. S.* died in 1825, *T. P. S.* in January 1826, leaving *J. W. S.* surviving. After the making of the above grant, an act of parliament was passed for inclosing the waste lands within the manor of *W.*, and it was thereby enacted, that all persons having any right of common over the waste lands therein mentioned, should give in to the commissioners therein named, an account, in writing, of their respective claims, within the time therein mentioned; and that the determination of the commissioners should be final and conclusive. By another clause it was enacted, that the commissioners should divide, allot, and inclose the common, and waste lands unto, for, and amongst every person or persons, proprietor and proprietors interested therein, in respect of their said old auster, or ancient tenement. By another clause it was enacted, that nothing in the act

contained should extend or be construed to extend to revoke, make void, alter, or annul any will or settlement, or to prejudice any person having any jointure, dower, portion, or incumbrance out of, upon, or any ways affecting any of the lands so intended to be divided and inclosed, but that the several messuages, tenements, farms, lands, hereditaments, and premises so to be set out and allotted upon such division and inclosure, should, immediately after such allotment should be made, remain and enure to and for such and the same uses, intents and purposes as the several messuages, tenements, farms, lands, and hereditaments, in respect or in lieu whereof such allotments should be made as aforesaid, then were, or should, or would have been in case that such act had not been made.

The commissioners by their award which was made, A. D. 1800, allotted unto *T. P. S.* and the dean and chapter of *W.*, according to their respective rights and interests, for and in respect of the ancient auster tenement, certain portions of the waste.

Held, first, that *J. W. S.* was not barred from bringing an ejectment by the statute of limitations, he having had no right of entry until the death of *T. P. S.* in 1826, nor by the clause in the inclosure act, whereby the award of the commissioners was declared to be final, inasmuch as the claim made by *T. P. S.* must be considered as having been made on behalf of all the parties interested in the copyhold tenement.

Held, secondly, that though *T. P. S.* was the only person named in the award, yet the allotment being made to him in respect of the copyhold estate,

and in lieu of right of common incident to that estate, the effect of it was to vest the legal estate in the allotment in the several persons entitled in succession to the copyhold estate; and that the legal estate in that allotment vested on the death of T. P. S. in J. W. S.; and that he therefore might maintain ejectment. *See on the doctrine of Sweating v. Hellard, T. 10 G. 4. Page 789*

INCOMPATIBLE OFFICE.

See CORPORATION, 8. 4.

INDEMNITY.

See BILL OF EXCHANGE, 10. 1
STAMP, 6.

INDICTMENT.

1. Upon an indictment founded on the stat. 21 Jac. 1. c. 15. or 8 Hen. 6. c. 9., whereby justices are empowered to give restitution of the possession of the lands entered upon by force, or holden by force, to the respective tenants thereof, the tenant whose land has been entered upon or withheld by force, is not a competent witness. *The King v. Williams, E. 10 G. 4. 549*

INFERIOR COURT.

See EVIDENCE, 17.

INSOLVENT DEBTORS' ACT.

1. In January 1819, A. had been discharged under the then insolvent debtors' act, 53 G. 3. c. 102. In the schedule, B. was described to be a creditor, in respect of 2000*l.* five per cent. navy bank annuities lent by B. to the defendant, and to secure the replacing of the stock on the 9th of October 1820, and the payment

of the dividend; in the mean time B. held no bond, and a warrant of attorney upon which judgment had been entered up. B. afterwards held a writ of habeas corpus upon the judgment; Held, that B. was entitled to be discharged upon filing common bail under the twenty-ninth section of the 63 and 64. 1806 c. 102. which enacted, "that no prisoner who shall have obtained his discharge shall be imprisoned by reason of any judgment or decree obtained for payment of money, or for any debt incurred, and with respect to which such discharge shall have been obtained." *See Salmon v. Miller, T. 10 G. 4. Page 770*

INSPECTION OF ACCOUNTS.

See PARTISANSHIP.

INSURANCE.

A vessel having goods on board upon which an insurance was effected, but which were warranted free from average, unless general, was placed in so much danger by perils of the sea, that the crew deserted her in order to save their lives, and the owners of the goods, upon receiving intelligence of this, gave notice of abandonment. A few days afterwards the vessel was found by some fishermen, and towed into port and repaired, but the goods (which were of a perishable nature) had been so much injured by the salt water that they would not have been worth anything if forwarded to the place of destination: Held, that the assured were entitled to recover for a total loss. *Parry v. Aberdeen, E. 10 G. 4. 411*

2. Where the agent of a ship-owner,

owner, effecting a policy on a ship, misrepresented the nature of the cargo which she was to carry, but this was not inserted in the policy, and it did not appear that the underwriter was induced by the misrepresentation to accept the risk. Held, that the jury were warranted in finding that the misrepresentation was not material, and that it did not vitiate the policy. *Plunk v. Headlam*, T. 10 G. 4. Page 693.

3. In an action on a policy on a voyage from Liverpool to a blockaded port, it was proved that the vessel sailed from G. on the voyage before the blockade was notified in this country, but afterwards put into another port in this kingdom, after such notification in the *London Gazette*, and when the blockade might be known there. The jury found that the captain did not know of the blockade. Held, that the knowledge of the captain was not to be presumed on the principle that the notice to a state was notice to all the subjects of that state, but that it was a question of fact for the consideration of a jury. *Harvatt and Another v. Wise*, T. 10 G. 4. Page 712.

4. A policy on goods at and from Liverpool to any port in the river Plate was effected; after notification in the *London Gazette* that such ports were blockaded. The ship, after such notification, sailed from Liverpool, and was taken by a Brazilian frigate in the river Plate, and sent to Rio Janeiro for adjudication, but was rescued by the master and crew, who brought the ship and cargo back to Liverpool, where the master landed and warehoused the goods. The assured, after they had heard of the capture, and after the rescue, but

before they heard of it, gave notice of abandonment to the underwriter. The jury found, that the master did not intend to break the blockade. Held, first, that the voyage, onured was not illegal, as the vessel might sail for Buenos Ayres without contravening the law of nations, for the purpose of inquiring whether the blockade continued. *Plunk v. Headlam*, T. 10 G. 4. Page 693.

Secondly, that the assured had no right to recover for a total loss by reason of their having offered to abandon, because the abandonment must be viewed with regard to the ultimate state of facts at the time when the offer to abandon was made. *Naylor and Others v. Taylor*, T. 10 G. 4. Page 718.

T. 10 G. 4. Page 718

INTEREST.

P. A., who was resident in France, being indebted to *B.* for money lent, promised by a written instrument to pay *B.* the sum therein mentioned within one month after his arrival in England. *A.* arrived in England in 1814. In 1818 *B.* applied to the attorney of *A.* for payment; and in 1819 commenced an action, which was continued till Easter term, 1828, when the cause was tried: Held, that *B.* was not entitled to recover interest on the principal sum, either from the time of *A.*'s arrival in England, or from the time when *B.* endeavoured to obtain payment, interest not being due on money secured by a written instrument, unless it appears on the face of the instrument itself that interest was intended to be paid, or unless it be implied from the usage of trade; as in the case of mercantile instruments.

instruments. *Page v. Newman*,
E. 10 G. 4. Page 378

JOINT STOCK COMPANY.

1. By a deed whereby a joint stock company was established, and a shareholder desirous of transferring his shares, was to give notice at the office of the company that he had agreed to sell the shares; and no person who purchased shares was to be deemed a proprietor until he executed the deed. The directors on notice of the transfer of any shares (made in conformity to the rules of the company) were to cause the transfer to be registered in the books of the company. Every person by whom such shares were transferred, was immediately after such transfer was registered in the books of the company to cease to be a proprietor. In an action in which the plaintiff sought to charge the defendant as a member of the company for goods sold, &c., the letters of the plaintiff, in which he admitted himself to be a shareholder on the 30th of March, 1826, were held to be proof of that fact, although it was not proved that he had ever executed the deed. Secondly, there being no proof of any actual transfers of the shares to a purchaser, or of the execution of the deed by him, an entry in the books of the company of a transfer to a purchaser on the 28th of March was held not to be evidence that the plaintiff had then ceased to be a partner; or if it was prima facie evidence of that fact, it was rebutted by the letters of the plaintiff, of a subsequent date, admitting himself to be a partner. *Harvey and Others v. Kay*, H. 9 G. 4. 856

2. Where it was proved that A. B. had contributed to the funds of a building society, and had been present at a meeting of the society and party to a resolution that certain houses should be built: Held, that this made him liable to an action for work done in building of those houses without proof that he had any actual interest in them, or in the land on which they were built. *Braithwait v. Skofield and Others*, E. 10 G. 4. 860 Page 401

3. In being in contemplation to form a company for distilling whiskey, the following prospectus was issued in May, 1825:—“(The conditions upon which this establishment is formed are,—the concern will be divided into twenty shares of 100% each, five of which to belong to A. B., the founder of the work, the other fifteen subscribers to pay in their subscriptions to Messrs. Moss and Co., bankers, at Liverpool, in such proportions as may be called for. The company to be under the management of a committee of three of the subscribers, to be chosen equally, on the 10th of October, ten per cent. to be paid into the bank on or before the 1st June next. Held, that this prospectus imported only that a company was to be, not that it was actually formed, and that a person who subscribed his name to this prospectus, and who was present at a meeting of subscribers when it was proposed to take certain premises for the purpose of carrying on the distillery, which were afterwards taken, and solicited others to become shareholders, but never paid his subscription, was not chargeable as a partner for goods supplied to the company. *Bourne v. Freeth*, T. 10 G. 4. 692

JUDGE'S ORDER.

See ACTION ON THE CASE, 2.

PRACTICE, 140.

JURISDICTION.

See MANDAMUS, 1.

JUSTICES.

1. Where a commitment under the 4 G. 4. c. 34, s. 30 recited that *A. B.* had contracted to weave certain pieces of silk goods for *C. D.* at certain prices agreed upon between them, and had neglected his work, after entering upon his said service, wherefore the justice convicted him and committed him for one month: Held, that contracting to weave certain goods was not contracting to serve within the meaning of the 4 G. 4. c. 34, s. 30, and that the justice had acted without authority. In a respite against him for false imprisonment, it appeared that *A. B.* was discharged from prison on the 14th of December, and the writ issued on the 14th of June: Held, that the action was commenced in time. *Hardy v. Ryle*, T. 10 G. 4. Page 603.
2. The summary jurisdiction given to justices by the 4 G. 4. c. 34, s. 9, extends only to cases where the relation of master and servant exists; and therefore, where *A.* had contracted with *B.* to build a wall for a certain price within a certain time, and having performed part of the work, refused to complete it; this was held not to be within the statute, and that a magistrate who acted upon the complaint of *B.*, and convicted and committed *A.* to prison, was liable to an action for

false imprisonment. *Lancaster v. Greaves*, T. 10 G. 4. Page 628.

LANDLORD AND TENANT.

See MORTGAGOR AND MORTGAGEE, 1; TROVER, 5.

1. In ejectment for a forfeiture incurred by using rooms in a house in a manner prohibited by the lease: Held, that such user was a continuing breach, and that the landlord was not, by receiving rent, precluded from taking advantage of the forfeiture, provided the user continued after such receipt of rent. *Doe d. Ambler v. Woodbridge*, E. 10 G. 4. \$76.
2. A demise by a tenant from year to year to another, also to hold from year to year, is in legal operation a demise from year to year during the continuance of the original demise to the intermediate landlord, and is properly so described in pleading, although at the time of making the contract no such qualification is mentioned. *Pike v. Eyre and Another*, T. 10 G. 4. 909.

LEASE.

See COVENANT, 1; EVIDENCE, 4.

LEGACY.

See EXECUTOR, 2; PROMISSION, 1.

LESSEE.

See POOR RATE, 3.

LIBEL.

1. Where a party was brought up for judgment, upon a conviction of publishing a libel imputing indictable offences to an individual:

dual : Held, that affidavits affirming the truth of the libel could not be read in mitigation. *The King v. Halpin*, H. 9 & 10 G. 4. Page 65

2. It is libellous and actionable to publish of a man that he has been guilty of gross misconduct, and insulted females in a barefaced manner. *Fletcher v. Chirps*, (in Error), H. 9 & 10 G. 4.

3. In an action for a libel contained in a newspaper, Held, that the publication was proved by the production of a newspaper corresponding in title, &c., with that described in the affidavit lodged at the stamp office. *Myne v. Fletcher*, E. 10 G. 4. 382.

4. In an action for libel, it appeared that the defendant, with whom the plaintiff had lived as servant, in answer to inquiries respecting her character, wrote a letter imputing misconduct to her whilst in that service, and after she left it; and the defendant also made similar parol statements to two persons that had recommended the plaintiff to her : Held, that neither the letter itself nor the parol statements proved malice, and that, consequently, the letter was a privileged communication, and the plaintiff not entitled to recover. *Child v. Affleck and Another*, H. 10 G. 4. 463.

5. In an action for a libel, the Judge left it to the jury to say, whether the defendant intended to injure the plaintiff : Held, that the direction was wrong, inasmuch as if the tendency of the libel was injurious to the plaintiff, the defendant must be taken to have intended the consequence of his own act. *Haile v. Wilson*, T. 10 G. 4. 643.

LICENCE.

See **PENAL ACTION.**

LIEN.

See **BANKRUPTCY** and **VENUE**.

LIMITATION.

See **DAWES**.

MANDAMUS.

See **APPEAL**.

To a mandamus to the lord mayor and aldermen of London, to admit and swear in A. B. to the office of alderman. They returned certain proceedings towards an election at a wardmote court, when A. B. was declared to be elected; and a return thereof made to the court of lord mayor and aldermen; and that that court has had from time immemorial, cognizance and jurisdiction to inquire into, and adjudicate upon, all elections at wardmote courts to city offices upon the petition of any party interested. That petitions by several parties interested were presented against the return of A. B.; that the merits were inquired into, and the election declared null and void by the said court of lord mayor and aldermen; and that A. B. was not duly elected, wherefore, &c. Traverse of the allegation, that A. B. was not duly elected. At the trial of the issue, it appeared that at first the lord mayor appointed three clerks to take the poll, but on the second day he dismissed two of them. After the number of votes was declared, the court declared that A. B. was duly elected.

MANDAMUS.

ed, a scrutiny was demanded and granted, and then the lord mayor dismissed the suitors at the wardmote, "to meet again upon a fresh summons." After this the lord mayor went out of office, and his successor issued a fresh summons for holding a wardmote, and there took the scrutiny, and declared A. B. duly elected, which was returned to the court of lord mayor and aldermen, who, upon petitions being presented, declared the election void as stated in the return. Upon a special case stating these facts, it was held, first, that the return was good in form; secondly, that the dustmen set out for the lord mayor and aldermen to inquire into, and adjudicate upon elections did not oust the jurisdiction of this court; thirdly, that the election was not invalid on account of the dismissal of two of the poll clerks, nor the change of the presiding officer; lastly, that this wardmote court was not dissolved (but only adjourned) by the dismissal of the suitors to meet again on a fresh summons. *The King v. The Mayor of London*, H. 6 & 10 G. 4.

2. By a local act for better governing and regulating the parish of *Paddington*, it was enacted, that no road which had not been repaired by the parish should be repaired out of the parochial funds, until such road should have been surveyed by two surveyors, and certified by them to have been properly formed, constructed, made, and defined, one of the surveyors to be appointed by the vestry, and one by the freeholder or his lessee. A road had been set out by the proprietors for the purpose of letting the frontage of 5660 feet as

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building ground. Eight houses had been built, and were inhabited, and twenty-six carcasses erected. The road had been formerly constructed, made, and drained, and used by the public for six months; and the freeholder and his lessee had appointed a surveyor, and required the vestry to appoint one, which they refused to do. The Court, in the exercise of its discretion, refused to grant a mandamus to the vestry, to compel them to appoint a surveyor, inasmuch as such appointment would have the effect of throwing on the parish the burden of repairing a road which would be not merely for the benefit of the public, but for the peculiar benefit of the freeholder during the time his buildings were erecting. *The King v. The Paddington Vestry*, 1 El. 10 G. 4. Page 456.

3. A rated parishioner has a right to inspect the accounts of the expenditure of the parish monies kept by guardians of the poor appointed under 22 G. 2. c. 83., and this Court granted a mandamus to the guardians &c. commanding to allow such inspection. *See v. The Guardians, Churchwardens and Overseers of Great Faringdon, in the County of Berks*, 1 El. 10 G. 4. 541.

MASTER AND SERVANT.

1. A master is liable in trespass for any act done by his servant in the course of executing his orders with ordinary care; and, therefore, where a master ordered a servant to lay down a quantity of rubbish near his neighbour's wall, but so that it might not touch the same, and the servant used ordinary care in executing the orders of his master,

tery but some of the rabbish naturally ran against the wall: Held, that the master was liable in trespass. *Gregory v. Pipe, L. 10 G. 4.* Page 591

2. The summary jurisdiction given to justices by the 4 G. 4. c. 34. s. 3. extends only to cases where the relation of master and servant exists; and therefore, where A. had contracted with B. to build a wall for a certain price within a certain time, and having performed part of the work refused to complete it, this was held not to be within the statute, and that a magistrate who acted upon the complaint of B. and convicted and committed A. to prison, was liable to an action for false imprisonment. *Dandridge v. Greaves, T. 10 G. 4.* 628

MEASUREMENT OF DISTANCE.

See COVENANT, 2.

MERSEY AND IRWELL NAVIGATION COMPANY.

See POOR RATE, 2.

MONEY HAD AND RECEIVED.

See ASSUMPSIT. BANKRUPT, 11.

MORTGAGOR AND MORTGAGEE.

See BOND, 4. DEVISE, 2.

1. A mortgagee having given notice to the tenants holding the mortgaged premises, under leases granted by the mortgagor after the mortgage, is entitled to receive from those tenants the rents actually due at the time of the notice, as well as those which accrued due afterwards.

And where such rents have been received by the agent of the mortgagor (after his bankruptcy, and were not actually paid over, held that the agent might retain such rents in order to pay the interest accruing due on the mortgage to the mortgagee, who had required him to do so, and that the assignees could not recover them. *Pope and another v. Magistrates, 4 Blighs, H. 9 & 10 G. 4.* Page 445

NAVIGATION.

See TITHES.

NENE NAVIGATION.

See TITHES, 2.

NEW TRIAL.

See PRACTICE, 4, 15.

NONSUIT.

See EXECUTOR, 5.

NOTIFICATION OF BLOCKADE.

See INSURANCE, 2.

NOTICE OF ACTION.

See PRACTICE, 11.

NOTICE OF DECLARATION.

See PRACTICE, 5.

NOTICE OF TRIAL.

See PRACTICE, 11.

NUISANCE.

See ACTION ON THE CASE, 1.

OUTSTANDING TERM.

See EJECTMENT, 1.

NOTICE

NOTICE OF ACTION.

See PRACTICE, 11.

By the act 7 & 8 G. 4. c. 30. for consolidating the laws relating to malicious injury to property, section 43, it is enacted, that in all actions to be commenced against any person for any thing done in pursuance of the act, notice in writing of such action, and the cause thereof, shall be given to the defendant one calendar month before the commencement of the action: Held, in an action brought by *A.*, who for a supposed malicious injury to property had been taken into custody by *B.*, who bonâ fide believed that he was acting in execution of the act, that *B.* was entitled to notice of action. — *Beechey v. Sides*, T. 10 G. 4.

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PARISHIONER.

1. A rated parishioner has a right to inspect the accounts of the expenditure of the parish monies kept by guardians of the poor appointed under 22 G. 2. c. 83.; and this court granted a mandamus to the guardians, &c., commanding to allow such inspection. *Rex v. The Guardians, Churchwardens, and Overseers of Great Farringdon*, B. 10 G. 4.

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PARTNERSHIP.

See ATTORNEY, 2. EVIDENCE, 5.

1. Where one of several partners in a banking house drew a bill in

his own name upon a third party, who accepted the same, upon condition that the drawer should provide for the same when due: Held, that all the partners in the banking firm could not recover on the bill. *Sparrow and others v. Chisman*, H. 10 G. 94.

Page 941

2. *A.*, *B.*, and *C.* carried on trade in partnership, and *A.* was also in partnership with *D.* *A.*, being indebted to the firm of *A.*, *B.*, and *C.* before the dissolution of that partnership, unknown to *D.*, indorsed a bill and paid over money (belonging to *A.* and *D.*) in discharge of the private debt due from *A.* to *A.*, *B.*, and *C.*, and immediately afterwards indorsed the same bill to a creditor of the firm of *A.*, *B.*, and *C.*. The partnership between *A.*, *B.*, and *C.* having been dissolved: Held, that *A.* and *D.* could not maintain trover against *B.* and *C.* for the bill, nor assumpsit for the money paid by *A.* out of the funds of *A.*, and *D.* to *A.*, *B.*, and *C.*, in discharge of his private debt.

A. and *D.* Having afterwards become bankrupt, it was held that their assignees could not maintain such actions. *Jones and Others, Assignees, v. Yates and Another*, E. 10 G. 4. 532

3. It being in contemplation to form a company for distilling whiskey the following prospectus was issued in May, 1825: — "The conditions upon which this establishment is formed, are, the concern will be divided into twenty shares of 100*l.* each, five of which to belong to *A.* *B.*, the founder of the works, the other fifteen subscribers to pay in their subscriptions to Messrs. Moss & Co., bankers, Liverpool, in such proportions as may be called for. The

The concern to be under the management of a committee of three of the subscribers, to be chosen annually on the 10th of October: ten per cent: to be paid into the bank on or before the 1st of June next." Held, that this prospectus imported only that a company was to be formed, not that it was actually formed; and that a person who subscribed his name to this prospectus, and who was present at a meeting of subscribers when it was proposed to take certain premises for the purpose of carrying on the distillery, which were afterwards taken, and solicited others to become shareholders, but never paid his subscription, was not chargeable as a partner for goods supplied to the company. *Bourne v. Fresh, T.* 10 G. 4. Page 632

4. In an action brought to charge A. as a partner to a trading company, a witness, who, by other evidence than his own, appeared to be a shareholder in the company, was held to be competent to prove that A. was a partner. *Hall v. Curzon and Others, T.* 10 G. 4. 646

PATENT.

Where a patentee of certain gas-apparatus, between the time of taking out the patent and enrolling the specification, made certain improvements in his apparatus, and in the specification claimed the machine so improved as his invention: Held, that this did not affect the validity of the patent. *Crossley v. Beverley, H.* 9 & 10 G. 4. 63

PAYMENT.

See BANKRUPT, 1. PRINCIPAL AND ASSENT, 2.

PENAL ACTION.

1. By statute 3 G. 4. c. 126. s. 65. no trustees of any turnpike road shall enjoy any office or place of profit under any act of parliament, in execution of which he shall have been appointed, or act as trustee; and if any person, after having been appointed a treasurer or trustee, shall, without having first duly resigned such office at some meeting of the trustees of the road, hold any such office, he shall forfeit 100*l.*: Held, that a trustee who accepted the office of treasurer, but allowed another to receive the rents of the tolls, and never made a profit, was liable to the penalty if the office yielded any profit: *De Lane v. Hillcoat,* 9 & 10 G. 4. Page 310
2. By statute 10 H. 8: it is enacted, that no person shall practise the faculty of physic within the city of London, or seven miles thereof, unless licensed by the president, college, and commonalty of the faculty of physic, under the penalty of 5*l.* for every month he shall exercise the same faculty without being so licensed: Held, in an action of debt, brought to recover penalties incurred under this act, that the plaintiffs would be entitled to costs if they succeeded; because, where a right is vested in an individual or corporation, the withholding that right, and thereby compelling a party to sue for it, is an injury for which damages may be recovered, and consequently that, under the 4 Jac. 1. c. 3. the defendant having succeeded was entitled to costs. *The President and College or Commonalty of the Faculty of Physic in London v. Harrison, E.* 9 & 10 G. 4. 524

PLEAD-

PLEADING.

1. *See Trespass, 14.*

The condition of a bond, after reciting that the obligor had been nominated treasurer and receiver of the rates and assessments made for the county, upon his giving security to the clerk of the peace for the due and faithful execution of the trusts reposed in him according to the statute, was, that the obligor should, when he was thereto required by the justices of the peace assembled at quarter sessions, or the major part of them, or by any committee of the said magistrates duly appointed, for that purpose by any order of the said court of quarter sessions now made, or hereafter to be made, well and truly account for all sums of money received by him by reason or on account of his office; and also if the obligor should faithfully perform all the trusts reposed in him by virtue of his said appointment: Held, that by the condition of this bond the county treasurer was bound to account for monies received by him in discharge of duties imposed on him by acts of parliament, passed subsequent to the 12 G. 2. c. 29, which required that the county treasurer should give sufficient security to be accountable for the money paid to him in pursuance of that act, and for the due and faithful execution of the trusts reposed in him; and that a breach of the condition was sufficiently assigned, which stated that the defendant, while he was treasurer, received divers sums of money, and that he was required by the justices at sessions to account, but did not do so; it being unne-

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cessary to allege that he had been required by an order of the court of quarter sessions, the words in the condition of the bond, "by any order of the said court of quarter sessions now made, or hereafter to be made," applying only to the appointment of a committee, and not to the requisition by the justices to account. *Farr v. Hollis*, H. 9 & 10 G. 4. Page 315

2. Where a submission to the award of two persons authorised the appointment of an umpire by them if they should disagree: Held, that they might choose an umpire before they entered upon the inquiry. The declaration on the award made under this submission, after stating the choice of an umpire, alleged that the arbitrators and umpire made the award: Held, that, taking the whole together, it was substantially an allegation that the umpire made the award. *Bates v. Cooke*, E. 10 G. 4. 407

3. To debt on bond defendant pleaded, that after the bond was executed he became bankrupt; that nine tenths of the creditors assembled at two meetings called pursuant to the 6 G. 4. c. 16. s. 133. and had agreed to accept a composition, whereupon the commission was superseded, and that he had been always ready and offered to pay the composition to the plaintiffs; but did not aver that the plaintiffs were present at the meetings, or had agreed to take the composition, or had proved under the commission: Held, that this plea was not an answer to the action.

Defendant further pleaded, that before the bond was executed he was indebted to M. J. and various other persons, and being insolvent agreed with them

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to

to pay a composition, and they agreed to release him. That several creditors, relying on that agreement, executed a release. That plaintiffs afterwards, as trustees for *M. J.*, obtained and accepted for the residue of the debt the bond in question by fraud and covin, without the knowledge or consent and in fraud of the other creditors. Replication, that the bond was not obtained by fraud and covin as alleged. The jury having found this issue for the defendant, judgment non obstante veredicto was entered up in C. P.: Held, on writ of error, that the facts alleged did not shew fraud and covin, inasmuch as it did not appear that the giving of the bond was connected with the agreement for the composition; and that the defendant could not give evidence of any other fraud but that which he had averred. *Tuck v. Tooke* (in Error), *T.* 10 G. 4. Page 437

4. Where a bond, after reciting that *A. B.* was colonial secretary of *Tobago*, and had appointed *C. D.* to be his deputy to execute the office and receive the fees, in consideration of his paying thereout to *A. B.* the annual sum of 450*l.* by equal half-yearly payments, was conditioned for the punctual payment of that sum (without saying "out of the fees"); and defendant pleaded that the bond was given in pursuance of an agreement to pay that sum *at all events*; upon which issue was taken, and found for the defendant: Held, that even supposing the agreement to be inconsistent with the language of the bond, it was competent to the defendant to plead and prove it, in order to shew that the bond was given upon an

- illegal consideration; and that the fact found by the jury shewed that the bond was illegal and void, by virtue of the statute 49 G. 3. c. 126. *Greville v. Atkins and Another, Executor and Executrix*, *E.* 10 G. 4. Page 462
5. To trespass *quare clausum* fregit, the defendant pleaded, first, not guilty; secondly, a right of common; thirdly, a right of way. The plaintiff took issue on the plea of not guilty, and traversed the rights of common and way; and new assigned to the second and third pleas, that the defendant, on other occasions, and for other purposes than those mentioned in the special pleas committed the trespasses complained of. Defendant in his rejoinder took issue upon the traverse of the right of common and right of way; and withdrew the plea of not guilty, so far as it related to the trespasses newly assigned, and suffered judgment by default to the new assignment. At the trial, the issue on one of the special pleas was found for the defendant, and the jury assessed the plaintiff's damages on the new assignment at 5*l.*: Held, that the defendant was entitled to the costs of the trial. *Cross v. Johnson*, *E.* 10 G. 4. 613
6. Trespass for breaking and entering the plaintiff's close and treading down the grass, &c., and breaking and destroying the hedges and fences of the plaintiff, &c. The defendant, as to all the trespasses, pleaded that the plaintiff's close was parcel of the manor of *C.*, and that a certain messuage, and four acres of land, with the appurtenances, at the said several times when, &c. were, and from time immemorial had been, within and parcel of the said manor and hundred, and

a customary tenement of that manor; and that within the said manor there was, and from time whereof, &c. there had been an ancient custom that every customary tenant of the said customary tenement, with the appurtenances, should have common of pasture upon the plaintiff's close. That J. S. being seised of the said customary tenement, having occasion to use his common of pasture, entered the close in which, &c., and put his cattle in, and because the hedges and fences had been improperly erected, threw them down. Replication, denying the custom for the customary tenant of the said customary tenement to have common of pasture, upon which issue was joined. Plea second, a prescriptive right of common of turbary in respect of said customary tenement, consisting of a messuage and land. Replication, denying the custom in respect of such said customary tenement, upon which issue was joined, and new assignment, that the defendant entered for other purposes than those mentioned in the plea. It appeared in evidence, that at the time of the plea pleaded, there was an ancient customary tenement, consisting of a dwelling-house and out-buildings, garden, and a small quantity of land, the customary tenant whereof had immemorially enjoyed such common of pasture in the plea mentioned; that for many years the defendant had been such customary tenant, and in 1812 had built a new dwelling-house on a part of the garden; that both the old and new dwelling-house continued to be occupied till 1828, when the former fell into decay, and was abandoned by the tenant, and

then remained unoccupied until it was finally pulled down in 1825, from which time there had been no dwelling-house on the tenement, except the one built by the defendant in 1821. During the years in which both the old and new dwelling-houses were occupied, the tenant of the former continued to exercise such customary rights on the wastes of the manor in respect thereof as he had before, and during that period it did not appear that the occupier of the latter had exercised any customary rights on the wastes of the manor in respect thereof, but since the new dwelling-house had been alone occupied, the customary tenant of the tenement had claimed and enjoyed all the same rights in respect thereof as had been claimed and enjoyed at any former period, and among others, the customary right stated in the second plea: Held, that upon this evidence, the defendant was entitled to have the issue joined upon the right of common of pasture found for him in respect of an ancient customary tenement.

It appeared that the defendants committed one trespass by breaking down a large portion of the fence which was standing upon the plaintiff's close, which the plaintiff had then newly erected upon the common, and that the defendants did so, really intending to assert and preserve their rights of common of pasture and of turbary; but that they broke down much more of the fence than was necessary for the convenient ingress and egress of men and commonable cattle, into and upon that part of the close which was inclosed by the fence, and that they did not intend, at

the time of committing the trespass, to exercise any of the said rights of common, nor had they with them any commonable cattle: Held, that, upon this evidence the defendants were entitled to have the issue found for them, upon the plea of "not guilty" to the new assignment. *Quære*, Whether the defendants were entitled to have the issue on the right of common of turbary found for them? *Arlett v. Ellis and Others*, T. 10 G. 4.

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7. Case by a reversioner of a house in *Cheapside* against the owner of the adjoining house, for pulling it down without shoring up the plaintiff's house, in consequence whereof it was impaired, and in part fell down: Held, first, that upon this declaration the plaintiff could not recover on the ground of the defendant's not having given notice that he was about to pull down his house, that not being alleged as a cause of the injury; secondly, that as the plaintiff had not alleged or proved any right to have his house supported by the defendants, he was bound to protect himself by shoring, and could not complain that the defendant had neglected it. *Peyton and Others v. The Mayor and Commonalty of London, as Governors of St. Thomas's Hospital*, T. 10 G. 4.

725

8. A demise by a tenant from year to year to another, and also to hold from year to year, is in legal operation a demise from year to year, during the continuance of the original demise, to the intermediate landlord, and is properly so described in pleading, although at the time of making the contract no such qualification is mentioned. *Pike v. Eyre and Others*, T. 10 G. 4.

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POOR RATE.

See APPEAL, 1.

1. The rent is the criterion of the value of the occupation of land; and the proprietors of a canal are rateable for the sum at which it would let, and not for their gross receipts minus their expenses. *The King v. The Trustees of the Duke of Bridgewater*, H. 9 & 10 G. 4.
2. By an act of parliament, certain persons were authorised to make the rivers *Mersey* and *Irwell* navigable from *L. to H.*, and to maintain such navigation; and, for those purposes, to clear, cleanse, scour, open, enlarge, or straighten the river, and to dig and cut the banks, and to make new cuts, trenches, or passages for water through lands adjoining, and to build bridges, sluices, locks, &c., and to do all other things necessary for making and maintaining the navigable passage, first giving satisfaction to the owners of lands; and, in consideration of the expenses to be incurred, the undertakers were authorised to take for their own proper use and behoof certain tolls. The undertakers made the river navigable, scoured and cleansed the same, and purchased lands for towing-paths and cuts: Held, that they were not liable to be rated to the poor for land taken for the purpose of the navigation, because they were not occupiers of that land, but had a mere easement in it; secondly, that they were liable to be rated for the new cuts; thirdly, that they were liable to be rated for the weirs, locks, and dams erected on their own lands. *The King v. The*

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- v. *The Company of Proprietors of the Mersey and Irwell Navigation*, H. 9 & 10 G. 4. Page 95
3. By an act of parliament certain persons were authorised to make the river *Avon* navigable from *B.* to *H.*, and to maintain such navigation; and, for those purposes, to clear, scour, open, enlarge, or straighten the river, to dig and cut the banks, to make new cuts, trenches, or passages for water through lands adjoining; and to build bridges, sluices, locks, &c. and to do all other things necessary for making and maintaining the navigable passage, first giving satisfaction to the owners of lands; and commissioners were appointed to settle what satisfaction every person should have for such proportion of his lands as should be cut, dug, removed, or made use of for carrying on the undertaking, and to settle what proportion of such purchase-money or satisfaction every person, having a particular estate or interest in any of the premises, should have for his respective interest; and, in consideration of the expenses to be incurred, the undertakers were authorised to take, for their own proper use and behoof, certain tolls. The undertakers made the river navigable, scoured and cleansed the same, and made a certain cut and lock, for the purposes of the navigation, upon lands purchased by them: Held, that they were not liable to be rated to the poor for land covered with water, being part of the river *Avon*, because they were not occupiers of that land, but had a mere easement in it; secondly, that they were liable to be rated for the cut and lock. *The King v. Thomas*, H. 9 & 10 G. 4. 114
4. Where a poor rate was made upon two thirds of the rent of lands, and one half the net rents of collieries: Held, that this might be a fair and equal mode of rating; and as the rates did not manifestly appear to be unequal, the Court refused to quash it. *The King v. Tomlinson*, H. 9 & 10 G. 4. Page 163
5. A lessee of a coal-mine, being the occupier, having erected a steam-engine for working the mine, and thereby improved its annual value, is liable to be rated for such improved annual value. *The King v. Lord Granville*, H. 9 & 10 G. 4. 188
6. The objects of a charity in the actual occupation of almshouses, paying no rent for the same, and removable at the pleasure of the patrons of the charity, are rateable to the relief of the poor, in respect of such occupation. *The King v. Ann Green and Others*, H. 9 & 10 G. 4. 203
7. Where a canal company were authorised to receive a mileage toll, for goods conveyed on the canal, and in lieu of the mileage duty, distinct tolls on all vessels passing through two locks, it was held, that the whole annual profits of the locks were for the purpose of being rated to the relief of the poor, to be considered as having been produced in that parish where the locks were situate, and not in the several parishes through which the canal passed, in proportion to the length of the canal in each parish.
The annual profit is the rent which a tenant would give, he paying the poor rates, and the expenses of repairs, and the other annual expenses necessary for making the subject of occupation productive, and allowing him a
3 S 3 deduction

deduction from the rent, where the subject is of a perishable nature, towards the expense of renewing or reproducing it. *Rex v. Lower Milton*, T. 10 G. 4.

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8. An act of parliament of the 9 & 10 W. 3. gave to certain undertakers authority to make navigable the river *Aire*, and for that purpose to cleanse and scour the same, and dig and cut the banks. By a subsequent act, reciting that the legal estate and interest in the navigation of the said river, and divers messuages, mills, warehouses, buildings, lands, tenements, and hereditaments, were vested in trustees, they were authorized by deed to sell and convey in fee such messuages, mills, lands, or tenements belonging to the undertakers, or to convey in fee by way of mortgage, as well *the said navigation*, as also all or any messuages, mills, lands, tenements, and hereditaments, being the property of the undertakers: Held, that the word navigation in that act imported an incorporeal hereditament, and that it authorized the trustees to mortgage in fee that incorporeal hereditament; and the first act having given the undertakers an incorporeal hereditament only, in the bed of the river, they were not rateable to the poor, as occupiers or owners of the river *Aire*. *The King v. The Undertakers of the Aire and Calder Navigation*, T. 10 G. 4. 820

9. When there is an appeal against a poor rate, on the ground that some person is omitted who ought to be rated, the justices at sessions cannot hear the appeal unless notice of the appeal, and the ground of it, has been given to the party said to have been im-

properly omitted. *The King v. Brooke*, T. 10 G. 4. Page 915

PRACTICE.

1. A party in the custody of the marshal of the *Marshalsea* being brought into court, may be charged with a writ de contumace capiendo. *The King v. Bailey*, H. 9 & 10 G. 4. 67
2. The plaintiff's attorney lodged a ca. sa. with the under-sheriff, without indorsing the place of abode or addition of defendant, and requested the under-sheriff to direct his warrant to a particular officer, and he would inform him where the defendant was. A latitat having been issued against the same defendant, he was arrested by a different officer, and discharged upon paying debt and costs. The officer demanded and received one guinea and a half, and observed that he might have kept the defendant in custody for two days until he searched the office. The Court, under these circumstances, set aside the ca. sa., on the ground that the rule of court had not been complied with; and if the writ were suffered to remain in force, and the sheriff compelled to make a return, he might be subjected to the peril of an action for an escape. *Clarke v. Palmer*, H. 9 & 10 G. 4. 153
3. A judgment for want of a plea cannot be signed on a dies non juridicus. *Harrison v. Smith*, H. 9 & 10 G. 4. 243
4. When a bill of exchange became due, it was agreed between the drawer and acceptor that it should be renewed; and on the back of the bill another instrument for the same value was drawn,

drawn, and accepted by the same parties, but it was not stamped. At the same time the name of the acceptor was erased from the first bill. In an action on that bill, the judge left it to the jury to find whether it had been cancelled with the consent of the drawer; and the unstamped instrument was submitted to the view of the jury: they having found that the bill was cancelled with the consent of the drawer, this Court made a rule for a new trial absolute, on the ground that the jurors ought not to have been permitted to draw a conclusion of fact from the unstamped instrument. The plaintiff having discontinued the action, it was held that the defendant was entitled to the costs of the trial. *Sweeting v. Hale*, H. 9 & 10 G. 4.

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5. Notice of declaration must state the nature of the action. *Sams v. Culham and Another*, H. 9 & 10 G. 4. 370
6. Where a detainer for debt was lodged against a person in custody on a criminal charge, who was afterwards convicted and sentenced to a year's imprisonment: Held, that the creditor was not bound to declare during that period. *Altroffe v. Lunn*, E. 10 G. 4. 395
7. Where a plaintiff, with the consent of the bail to the sheriff, took a cognovit, with a stay of execution for a month: Held, that although the bail continued liable, the debt not having been paid, yet the plaintiff could not take proceedings against them without giving them notice that the cognovit was unsatisfied. *Clift and Another v. Gye*, E. 10 G. 4. 422
8. An affidavit to hold to bail, stating that the defendant was indebted to the plaintiff in the sum of 29*l.* for meat and other necessaries found and provided by the plaintiff for the defendant, and for money paid, laid out, and expended, and lent and advanced by this deponent (the plaintiff) to the defendant, and at his like request, is not sufficient, as it did not state that the money laid out and expended was laid out and expended for the defendant. *Fricke v. Poole*, E. 10 G. 4. Page 543
9. Where there are two defendants, one of whom is served with process and appears, but the other cannot be served, the plaintiff must obtain time to declare, as where there is one defendant only. *Morton and Another v. Grey*, E. 10 G. 4. 544
10. To entitle a defendant, who at the time of the service of the writ was resident in *Wales*, to costs, under the 5 G. 4. c. 106. s. 21. the Judge who tried the cause must certify that the defendant was resident in *Wales*. It is not sufficient to state in the certificate the evidence from which such conclusion may be drawn. *Jardine and Others, Assignees, v. Lewis*, E. 10 G. 4. 555
11. Where four terms have elapsed without any proceeding having been taken in a cause, the defendant cannot rule the plaintiff to enter the issue without giving a term's notice of his intention to proceed in the cause. *Lord v. Hilliard*, T. 10 G. 4. 621
12. A party was articulated as a clerk to one of two attorneys in partnership, and paid a premium, and acted as clerk to the two partners for two months, when the attorney to whom he had been articulated died: the Court ordered the surviving partner to refund a portion of the premium, 3 S 4 although

although at the time of the payment of such premium his partner was indebted to him, and the premium had been set off in account between them. *Ex parte Bayley in the matter of Harper*, T. 10 G. 4. Page 691

13. Bail are not discharged by the plaintiff's taking a cognovit from the principal, unless time be thereby given.

The plaintiff may sue out a fi. fa. against the principal, and levy part of the debt, and afterwards sue out a ca. sa. as to the residue, and charge the bail. *Stevenson v. Roche*, T. 10 G. 4. 707

14. Where a Judge's order for taxing an attorney's bill is not obtained until after he has commenced an action for the amount, the defendant is not entitled to costs of taxation, although more than one sixth is taken off by the master. *Harbin, Gent. one, &c. v. Miles*, T. 10 G. 4. 755

15. A plaintiff after giving notice of trial withdrew his record, and the defendant obtained a rule for payment of the costs of the day, which were taxed. At the next assizes the plaintiff obtained a verdict, and a new trial was granted on the payment of costs: Held, that the defendant might set off the costs due to him against those payable on the rule for the new trial. *Doe dem. Dan-gerfeld and Mary his wife v. Allsop*. 760

16. Where upon a special jury cause being called on for trial, there was not a full special jury, and neither party prayed a tales, the defendant cannot afterwards take down the record by proviso. *Phillips v. Dance*, T. 10 G. 4. 769

PRINCIPAL AND AGENT.

See BILL OF EXCHANGE, 3.

1. At the time of making a contract of sale, the party buying the goods represented that he was buying them on account of persons resident in *Scotland*, but did not mention their names, and the seller did not enquire who they were; but afterwards debited the party who purchased the goods: Held, that the seller might afterwards sue the principals for the price. *Thompson v. Davenport and Another (in error)*, H. 9 & 10 G. 4. Page 78
2. Where a tradesman who had supplied goods to a ship sent in his account to the owner's agent and ship's husband, and took his acceptance at three months for the amount, deducting discount for that time, which was the usual credit, and when the bill became due consented to a renewal of it, adding interest, and in like manner took a third acceptance, which was dishonoured, and the agent soon afterwards failed; the balance in his hands in favour of his principal (the ship-owner) having during all this time exceeded the amount of the bill, which was, however, unknown to the principal, who had never inspected the agent's accounts: Held, that the tradesman might sue the ship-owner for the amount of his claim, and that it was not discharged by the acceptance of the agent. *Robinson v. Read*, E. 10 G. 4. 449

PRISONER.

See ARREST, 1. PRACTICE, 1.

PRO.

PROHIBITION:

Testator devised to his executors, their heirs and assigns, his lands, upon trust to sell the same; and directed that the money arising from the sale should be deemed part of his personal estate, and that it should be subject to the disposition made concerning his personal estate. He then directed his personal estate to be sold; and when the money arising from the sale of his personal and real estate should be collected, he disposed of it in the manner mentioned in the will; and, among other dispositions, he bequeathed a legacy to *A. B.*: Held, that the money arising from the sale of the real estate was equitable assets, and that a legatee could not maintain a suit in the ecclesiastical court to recover his legacy. *Barker v. May*, *E. 10 G. 4.* Page 489

PROMISSORY NOTE.

See *BILL OF EXCHANGE*, 2. 6. EX-ECUTOR, 1.

PROMOTIONS, p. 371. 617.

PURSER.

See *COURT MARTIAL*.

QUO WARRANTO.

See *CORPORATION*, 5.

RATE.

See *INCLOSURE ACT*, 1. *TITHES*, 1.

REVERSIONER.

See *COVENANT*, 1. *HUNDRED*, ACTION AGAINST.

RIVER NAVIGATION.

See *POOR RATE*, 2, 3. 8.

SALEABLE OFFICES.

See *BOND*, 3.

SCRIP RECEIPTS.

See *ASSUMPSIT*, 6.

SEISIN, LIVERY OF.

See *EVIDENCE*, 19.

SESSIONS.

See *APPEAL*, 1, 2. *POOR RATE*, 9.

SET OFF.

See *BANKRUPT*, 10. *PRACTICE*, 15.

SELECT VESTRY.

1. The commissioners for building and enlarging churches having, pursuant to the statutes 58 G. 3. c. 45., and the 59 G. 3. c. 30., appointed twenty-six persons to be a select vestry for the care and management of a church, and all matters relating thereto: Held, that, in order to constitute a good assembly of the select vestry so appointed, there must be present a majority of the number (viz. fourteen) named in the appointment; and, therefore, that a rate for the repair of the church, made at a meeting where there was not such a majority, was illegal; and that payment of such a rate could not be enforced in the ecclesiastical court. *Blacket v. Blizard and Another*, *T. 10 G. 4.*

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SET-

SETTLEMENT, *Evidence of.*

Relief given to a pauper, not residing in the relieving parish, is *prima facie* evidence of his being settled there; but the sessions are not bound, upon such evidence only, to find that he is settled in the relieving parish; and, therefore, where, upon the trial of an appeal, the pauper proved relief given to him by the appellants parish while resident in another parish, the sessions having quashed the order of removal, the Court of K. B. refused to disturb the decision. *The King v. The Inhabitants of Yarwell*, T. 10 G. 4. Page 894

SETTLEMENT — *by Apprenticeship.*

A married woman, on binding her son, an illegitimate child, an apprentice, agreed with the master that 10*l.* should be the premium inserted in the indenture, but that he should receive something more. The husband of the mother of the apprentice paid the 10*l.*, and the mother, without her husband's knowledge, paid the master a further sum of two guineas and a half: Held, that there being no valid contract to pay more than the sum of 10*l.*, the full sum received, given, paid, secured, or contracted for, at the time of the execution of the indenture, was inserted in the indenture, within the meaning of the stat. 8 Ann. c. 9. s. 39., that it was valid, and that a settlement was gained by service under it. *The King v. Inhabitants of Bourton-upon-Dunsmore*, T. 10 G. 4. 872

2. *A.*, being of full age, entered together with his father into the following agreement (not under seal): that he would serve as an articulated servant for four years, to learn his art or trade of a plumber, glazier, and painter, at weekly wages; and it was agreed that *A.* should be considered as an out apprentice. *A.* was to do gardening or any other work his master should set him about; and in case *A.* should be ill, the master should not pay him any wages during the time he should be ill. The master agreed to teach and instruct *A.* in the art and mystery of a plumber, glazier, and painter. *A.* served for a year under his contract, which was not under seal: the sessions having found that this was a defective contract of apprenticeship, and not a contract of hiring, the Court affirmed their decision. *The King v. The Inhabitants of Tipton*, T. 10 G. 4. Page 888

SETTLEMENT — *by Estate.*

Testator, by his will, devised to his daughter, *Elizabeth*, the widow of his late son, *T. M.*, part of a messuage or tenement therein described, to hold to her and her assigns for and during the term of her natural life, if she should so long continue a widow and unmarried; and from and after her decease, or day of marriage, which should first happen, he gave and devised the premises, before given to his wife, and also other real property therein mentioned, unto the four children of his late son, *T. M.*, deceased, in fee: Held, that by this devise, the children of *T. M.* took no estate in any part of the property devised till after the death of *Elizabeth*;

Elizabeth; and consequently that one of them, a pauper, who came, during the lifetime of his mother, to reside in the parish where the lands not given to *Elizabeth* for life were situate, gained no settlement by estate. *The King v. The Inhabitants of Ringstead, H.* 9 & 10 G. 4. Page 218

SETTLEMENT — by Hiring and Service.

1. A local militia-man hired himself at Lady-day 1811, to serve for a year, without communicating the fact of his being in the militia to the person with whom he so contracted. By the local militia act then in force, the 48 G. 3. c. 111. s. 15., it is provided, that no ballot enrolment and service under that act shall make void, or in any manner affect, any indenture of apprenticeship or contract of service between any master or servant, notwithstanding any covenant or agreement in such indenture or contract; and no service, under that act, of any apprentice or servant shall be deemed to be an absence from service: Held, that that section of the statute applied only to contracts existing at the time of the ballot or enrolment, and not to contracts subsequently made; and, therefore, that the pauper, at the time when he hired himself, was not capable of making an absolute contract to serve for a year, and, consequently, that he was not lawfully hired for a year, and gained no settlement. *The King v. The Inhabitants of Taunton St. James, T.* 10 G. 4. 831
2. A pauper hired herself to A. B., to work in his factory for four years, at weekly wages. There

was a stipulation in the agreement, that the pauper should observe and obey all the rules and regulations of the factory, as well with regard to the hours of attendance and of work, as the mode and other particulars of working. The pauper was told she must work twelve hours a day; but the rules of the factory having been occasionally varied by the master: Held, that this was not an exception in the contract of hiring, and that a settlement was gained by service under it. *The King v. Saint John, Devizes, T.* 10 G. 4. Page 896

A pauper was hired for a year at the wages of 4s. 6d. per week, to work from six in the morning to seven in the evening, with liberty to make as much overwork as he pleased: Held that this was an exceptive hiring, and that no settlement was gained by serving under it. *The King v. Inhabitants of Birmingham, T.* 10 G. 4. 925

SETTLEMENT — by Renting a Tenement.

1. By the 6 G. 4. c. 57., which repealed the 59 G. 3. c. 50., it was enacted, that no person shall acquire a settlement by reason of settling upon any tenement, unless it shall consist of a separate and distinct dwelling-house, or of land, or of both, bona fide rented by such person at the sum of 10l. a year, at the least for the term of one whole year, nor unless such house or building, or land, shall be occupied under such yearly hiring: Held by *Lit- tledale and Park Justices* (*Bayley J.* dissentiente), that under this statute a pauper who rented a dwelling-house, the yearly value of 10l., and resided in it, but underlet part, thereby gained a settlement.

tlement. *The King v. The Inhabitants of Ditchat*, H. 9 & 10 G. 4. Page 176

SEWERS' RATE.

1. Where in a large district, placed under one set of commissioners of sewers by the same commission, there were six separate lines of sewers, by which six several levels or divisions (into which the district was divided) were separately drained, and no one level derived benefit from the sewers in the others: Held, that the commissioners ought to make a separate rate upon each level or division, for the maintenance of the sewers by which it was drained, and not one equal rate upon the whole district for the maintenance of all the sewers within it. *The King v. the Commissioners of Sewers for the Tower Hamlets*, E. 10 G. 4. 517

SHERIFF.

See PRACTICE, 2.

1. Where a sheriff, under a writ of fi. fa. against A., seized and sold the furniture in his house, where he lived with a woman to whom he had been married, and to whom the goods belonged before the marriage: Held, that the woman having afterwards discovered that the marriage was void, might maintain trover against the sheriff, and recover the value of the goods, although it exceeded the price for which they were sold. *Glaspoole v. Young and Others*, T. 10 G. 4. 696

SPECIAL JURY.

See PRACTICE, 16.

STAMP.

1. When a bill of exchange became due, it was agreed between the drawer and acceptor, that it should be renewed; and on the back of the bill another instrument for the same value was drawn, and accepted by the same parties, but it was not stamped. At the same time the name of the acceptor was erased from the first bill. In an action on that bill the Judge left it to the jury to find whether it had been cancelled with the consent of the drawer, and the unstamped instrument was submitted to the view of the jury: they having found that the bill was cancelled with the consent of the drawer, this Court made the rule for a new trial absolute, on the ground that the jury ought not to have been permitted to draw a conclusion of fact from the unstamped instrument. *Sweeting v. Halse*, H. 9 & 10 G. 4. Page 365
2. A. being entitled during his life to the dividends of certain Bank annuities, and B. being entitled to the stock at the death of A., it was agreed between them, that in consideration of A.'s permitting B. to sell out the stock, the latter should pay to A., during his life, an annuity equivalent to 5 per cent. on the principal money produced by the sale of the stock; and that, as a security for the payment of the annuity, A. should assign to B. a policy of assurance on goods on a voyage to India. By deed, reciting these facts, and that the stock had been sold

- sold out and produced a given sum which had been paid to *B.*, the latter bargained, sold, and assigned to *A.* the policy, and covenanted that in case no money should be produced by the policy, that he would, within one month after his return from the voyage which he was about to make to *India*, pay to *A.* a sum of money which, when invested in stock, would produce an annuity equal in amount to 5 per cent. on the principal money produced by the sale of the stock: Held, that the deed did not require an ad valorem stamp, the transaction described in it not being a "sale" of an annuity within the meaning of the words in the 53 G. 3. c. 184. sched. part. 1., and the assignment of the policy not being a conveyance "of property" within the meaning of that word in the same statute. *Blandy v. Herbert*, *E.* 10 G. 4. Page 396
3. A promissory note payable to *A. B.* or order on demand, is within the second class of notes mentioned in the schedule to the 55 G. 3. c. 184., being a note payable in another manner than to bearer on demand, and not exceeding two months after date. *Moyser and Another, Executors, v. Whitaker*, *E.* 10 G. 4. 409
4. A note sent by a broker to his principal containing an account of a purchase of shares in a joint stock company, and the price paid for the same, does not require a stamp. *Tomkins v. Savory*, *T.* 10 G. 4. 704
5. Where one and the same sum of money was secured by mortgage deed and by bond, which were executed at the same time, but did not bear the same date, the mortgage-deed being impressed with a stamp denoting the payment of the ad valorem duty, and

- the bond with a stamp of 1*l.* only; it was held that the bond was not properly stamped, and, therefore, not receivable in evidence. *Wood v. Norton and Others*, *T.* 10 G. 4. Page 885
6. Where *A.* as principal, and *B.* as surety, were jointly and severally bound to pay to the creditors of *C.* 14*s.* in the pound, on account of their debts, and by the same bond *A.* was bound to indemnify *B.* against all loss by reason of his becoming surety: Held that a stamp of 1*l.* 15*s.* was sufficient in amount for this instrument, and that it did not require a second stamp on account of *A.*'s obligation to indemnify *B.*, the whole being one transaction.—*Annandale v. Pattison*, *T.* 10 G. 4.

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STOCK.

See ASSUMPSIT, 6.

STOLEN NOTE.

See BILL OF EXCHANGE, 3.

SUBSCRIBERS.

See JOINT STOCK COMPANY, 3.

SURRENDER.

See EVIDENCE, 4.

TALES.

See PRACTICE, 16.

TITHES.

1. *A.* being lessee of tithes, compounded for them with the respective occupiers by parol agreements, under which they retained the tithes accruing on their respective lands to their own

own use, with the remaining nine parts, from which no severance took place. The tithes were not bargained and sold when at maturity, but the agreements were prospective, and had no reference either to any specific mode of cultivating the lands, or to the amount of produce in any particular year. The composition-money was paid half-yearly: Held, that the lessee was an *occupier of tithes* within the meaning of those words in the highway acts, and liable to be rated as such. *Chanter v. Glubb and Another*, E. 10 G. 4. Page 479

2. By an act of parliament for improving a navigation, all persons who should be seised, possessed, or interested in any lands, tenements, or hereditaments which should be wanted for the purposes of the act, were authorised to contract for and sell the same lands, tenements, or hereditaments, and to convey and assure the same to the commissioners appointed for executing the act; and all such persons were authorised to receive such compensation for the value of such lands, tenements, and hereditaments, or for any damage which should be done thereto in the execution of the works authorised to be made, as should be agreed upon by and between the commissioners and the owners and occupiers; and in case they should not agree, the amount was to be ascertained by the verdict of a jury. By another clause, reciting that for settling all differences that might arise between the commissioners for executing the act and the several persons interested in any lands, tenements, or hereditaments which should or might be taken and effected, or prejudiced for any of the purposes of the act, or by

reason of any of the powers thereby granted, the commissioners, in case any such person refused to accept the compensation offered to them, were authorised to summon a jury to award the sum of money to be paid by the commissioners to the parties interested as a compensation for the purchase of such lands, tenements, or hereditaments. The commissioners having taken for the purpose of the navigation titheable land, and covered it with water, it was held that the tithe-owner was not entitled to compensation. *The King v. The Commissioners of Nene Outfall*, T. 10 G. 4.

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TOWN-CLERK.

See CORPORATION, 3.

TRANSFER OF STOCK.

See EXECUTOR, 2.

TREASURER.

1. By stat. 3 G. 4. c. 126. s. 65. no trustee of any turnpike road shall enjoy any office or place of profit under any act of parliament, in execution of which he shall have been appointed, or act as trustee; and if any person, after having been appointed a *treasurer* or a trustee, shall, without having first duly resigned such office at some meeting of the trustees of the road, hold any such office, he shall forfeit 100*l.*: Held, that a trustee, who accepted the office of treasurer, but allowed another to receive the rents of the tolls, and never made a profit, was liable to the penalty if the office yielded any profit. *De Lane v. Hillcoat*, H. 9 & 10 G. 4. 910
2. The

2. The condition of a bond, after reciting that the obligor had been nominated treasurer and receiver of the rates and assessments made for the county, upon his giving security to the clerk of the peace for the due and faithful execution of the trusts reposed in him according to the statute, was, that the obligor should, when he was thereto required by the justices of the peace assembled at quarter sessions, or the major part of them, or by any committee of the said magistrates duly appointed for that purpose by any order of the said court of quarter sessions, now made, or hereafter to be made, well and truly account for all sums of money received by him by reason or on account of his office; and, also, should faithfully perform all the trusts reposed in him by virtue of his said appointment: Held, that by the condition of this bond, the county treasurer was bound to account for monies received by him in discharge of duties imposed on him by acts of parliament passed subsequent to the 12 G. 2. c. 29., which required that the county treasurer should give sufficient security to be accountable for the money paid to him in pursuance of that act, and for the due and faithful execution of the trusts reposed in him; and that a breach of the condition was sufficiently assigned which stated, that the defendant, while he was treasurer, received divers sums of money, and that he was required by the justices at sessions to account, but did not do so; it being unnecessary to allege that he had been required by an order of the court of quarter sessions, the words in the condition of the bond, "by any order of the said court of quarter sessions

now made, or hereafter to be made," applying only to the appointment of a committee, and not to the requisition by the justices to account.

By the militia act, 43 G. 3. c. 47. s. 9., the weekly payments to be made under that act to the families of non-commissioned officers, drummers, and privates, are to be repaid to the overseer of the poor of the parish in which such family reside, by the treasurer of the county in which such parish is situate, and every weekly allowance which shall be so paid to the family of any private man in any other parish than the one for which such private man shall serve, shall respectively be reimbursed in the manner thereafter mentioned.

Sect. 16. provides, that the treasurer who shall reimburse to any overseer any money on account of such weekly allowances, shall *deliver* or transmit an account of such money as he shall have so reimbursed, signed by justices of the county where such family dwell, to the treasurer of the county, in the militia whereof such private man shall serve; and the treasurer to whom such account shall have been delivered or transmitted, shall forthwith pay to the treasurer who shall have transmitted it the sums so reimbursed to the overseers.

Sect. 17. enacts, that the treasurer who shall repay to any treasurer of any other county any such allowances on any such signed account, shall transmit such signed account, and also an account of the monies repaid by him in pursuance thereof, to the justices at the next quarter sessions, and they are to make order for the overseers of the poor of the respective parishes for which the

the militia-man shall have served, to pay the same to the treasurer :

Held, that, under this statute, it was the duty of the treasurer who reimbursed the overseers' sums of money, on account of the weekly allowance paid to the family of a militia-man serving in the militia of any other county, to transmit an account of the money so reimbursed to the treasurer of the county in the militia whereof such man served ; but that it was no part of his duty, after that account had been transmitted, to demand, have, or recover the sum of money so reimbursed from, or take any proceedings at law against, the treasurer of the county to whom that account had been transmitted for obtaining payment of the same ; nor was it any part of the duty of such treasurer, after he had transmitted such account, and after neglect of payment by the treasurer of the county to whom it has been transmitted for a reasonable time, to notify and report to the justices at quarter sessions the transmitting of the account, and the neglect of payment thereof ; nor, after the treasurer has paid to the treasurer of another county sums paid by him to the overseer of the poor of a parish in which the family of a militia-man was residing, to obtain an order of sessions for the overseers to pay that sum. *Farr v. Hollis*, H. 9 & 10 G. 4. Page 315

TRESPASS.

1. A master is liable in trespass for any act done by his servant in the course of executing his orders with ordinary care ; and, therefore, where a master ordered a servant to lay down a quantity of rubbish near his neighbour's

wall, but so that it might not touch the same, and the servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran against the wall : Held, that the master was liable in trespass. *Gregory v. Pipe*, E. 10 H G. 4. Page 591

2. Where a commitment under the 4 G. 4. c. 34. s. 3. recited, that A. B. had contracted to weave certain pieces of silk goods for C. D., at certain prices agreed upon between them, and had neglected his work after entering upon his said service, wherefore the justice convicted him, and committed him for one month : Held, that contracting to weave certain goods, as stated in the commitment, was not contracting to serve within the meaning of the 4 G. 4. c. 34., and that the justice had acted without authority.

In trespass against him for false imprisonment, it appeared that A. B. was discharged from prison on the 14th of December, and the writ issued on the 14th of June : Held, that the action was commenced in time. *Hardy v. Ryle*, E. 10 G. 4. 603

3. To trespass quare clausum fregit, defendant pleaded, first, not guilty ; secondly, a right of common ; thirdly, a right of way. The plaintiff took issue on the plea of not guilty, and traversed the rights of common and of way ; and new assigned to the second and third pleas, that the defendant, on other occasions, and for other purposes than those mentioned in the special plea, committed the trespasses complained of. Defendant in his rejoinder took issue upon the traverse of the right of common and right of way ; and withdrew the plea of not

not guilty, so far as it related to the trespasses newly assigned, and suffered judgment by default to the new assignment. At the trial, the issue on one of the special pleas was found for the defendant, and the jury assessed the plaintiff's damages on the new assignment at 5*l*.: Held, that the defendant was entitled to the costs of the trial. *Cross v. Johnson*, E. 10 G. 4. Page 619

4. The summary jurisdiction given to justices by the 4 G. 4. c. 34. s. 3. extends only to cases where the relation of master and servant exists; and, therefore, where A. had contracted with B. to build a wall for a certain price within a certain time, and having performed part of the work, refused to complete it; this was held not to be within the statute, and that a magistrate who acted upon the complaint of B., and convicted and committed A. to prison, was liable to an action for false imprisonment. *Lancaster v. Greaves*, T. 10 G. 4. 628

5. Trespass for breaking and entering the plaintiff's close and treading down the grass, &c., and breaking and destroying the hedges and fences of the plaintiff, &c. The defendant, as to all the trespasses, pleaded that the plaintiff's close was parcel of the manor of C.; and that a certain messuage, and four acres of land, with the appurtenances, at the said several times when, &c. were, and from time immemorial had been, within and parcel of the said manor and hundred, and a customary tenement of that manor; and that within the said manor there was, and from time whereof, &c. there had been, an ancient custom that every customary tenant of the said customary tenement, with the appurten-

ances, should have common of pasture upon the plaintiff's close. That J. S., being seised of the said customary tenement, having occasion to use his common of pasture, entered the close in which, &c., and put his cattle in, and because the hedges and fences had been improperly erected, threw them down. Replication, denying the custom for the customary tenant of the said customary tenement to have common of pasture, upon which issue was joined. Plea second, a prescriptive right of common of turbary in respect of said customary tenement, consisting of a messuage and land. Replication, denying the custom in respect of such said customary tenement, upon which issue was joined, and new assignment, that the defendant entered for other purposes than those mentioned in the plea. It appeared in evidence, that at the time of the plea pleaded, there was an ancient customary tenement, consisting of a dwelling-house and out-buildings, garden, and a small quantity of land, the customary tenant whereof had immemorially enjoyed such common of pasture in the plea mentioned; that for many years the defendant had been such customary tenant, and in 1812 had built a new dwelling-house on a part of the garden; that both the old and new dwelling-house continued to be occupied till 1823, when the former fell into decay, and was abandoned by the tenant, and then remained unoccupied until it was finally pulled down in 1825, from which time there had been no dwelling-house on the tenement, except the one built by the defendant in 1821. During the years in which both the old and

new dwelling-houses were occupied, the tenant of the former continued to exercise such customary rights on the wastes of the manor in respect thereof as he had before, and during that period it did not appear that the occupier of the latter had exercised any customary rights on the wastes of the manor in respect thereof, but since the new dwelling-house had been alone occupied, the customary tenant of the tenement had claimed and enjoyed all the same rights in respect thereof as had been claimed and enjoyed at any former period, and among others, the customary right stated in the second plea: Held, that upon this evidence, the defendant was entitled to have the issue joined upon the right of common of pasture found for him in respect of an ancient customary tenement.

It appeared that the defendants committed one trespass by breaking down a large portion of the fence which was standing upon the plaintiff's close, which the plaintiff had then newly erected upon the common, and that the defendants did so, really intending to assert and preserve their rights of common of pasture and of turbary; but that they broke down much more of the fence than was necessary for the convenient ingress and egress of men and commonable cattle, into and upon that part of the close which was inclosed by the fence, and that they did not intend, at the time of committing the trespass, to exercise any of the said rights of common, nor had they with them any commonable cattle: Held, that upon this evidence the defendants were entitled to have the issue found for them, upon the plea of "not guilty" to the new assignment.

Quere, Whether the defendants were entitled to have the issue on the right of common of turbary found for them? *Arlett v. Ellis and Others*, T. 10 G. 4.

Page 671

6. Where in trespass quare clausam frigit, defendant prescribed in a que estate for a right of way over the locus in quo, and it appeared that the defendant's land had within fifty years been part of a large common, and afterwards inclosed under the provision of an act of parliament, and allotted to the defendant's ancestor: Held, that notwithstanding this evidence, the right claimed by the defendant's plea might in law exist; and the jury having found that in fact it did exist, the Court refused to disturb the verdict. *Codling v. Johnson*, T. 10 G. 4.

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TRIAL BY PROVISIO.

See PRACTICE, 16.

TROVER.

See ASSUMPSIT, 1. BANKRUPT, 1.
BILL OF EXCHANGE, 3.

1. *A.*, *B.*, and *C.* carried on trade in partnership, and *A.* was also in partnership with *D.* *A.* being indebted to the firm of *A.*, *B.*, and *C.* before the dissolution of that partnership, unknown to *D.*, indorsed a bill and paid over money belonging to *A.* and *D.*, in discharge of the private debt due from *A.* to *A.*, *B.*, and *C.*, and immediately afterwards indorsed the same bill to a creditor of the firm of *A.*, *B.*, and *C.* The partnership between *A.*, *B.*, and *C.* having been dissolved: Held, that *A.* and *D.* could not maintain trover against *B.* and *C.* for the bill, nor assumpsit for the money paid by *A.* out of the funds of *A.* and *D.*, to *A.*, *B.*, and

and C. in discharge of his private debt.

A. and D. having afterwards become bankrupt, it was held that their assignees could not maintain such actions. *Jones and Others Assignees v. Yates and Young, E. 10 G. 4.* Page 532

2. In an action of trover brought by a person, against whom a commission of bankrupt had issued, against his assignees, to recover goods which they had, as such assignees, sold, it appeared that the bankrupt had assisted the assignees, by giving directions as to the sale of the goods; and that, after the issuing of the commission, he gave notice to the lessors of a farm which he held that he had become bankrupt, and that he was willing to give up the farm, and in consequence the lessors received the lease, and accepted possession of the premises: Held, first, that the interference of the plaintiff in the sale of his goods was referable to an intention on his part to take care of the property, and see that the most was made of it, and that it did not amount to an assent to the sale, and that he was not thereby estopped from bringing an action against his assignees.

Secondly, that he was not estopped by the act of having given up his lease to his lessors, the assignees not being parties or privies to that transaction. *Heane v. Rogers and Another, E. 10 G. 4.* 577

3. Where a sheriff, under a writ of fi. fa. against A., seized and sold the furniture in his house, where he lived with a woman to whom he had been married, and to whom the goods belonged before the marriage: Held, that the woman having afterwards discovered that the marriage was

void, might maintain trover against the sheriff, and recover the value of the goods, although it exceeded the price for which they were sold. *Glasspoole v. Young and Others, T. 10 G. 4.* Page 696

4. Where bills of exchange were delivered by a trader in contemplation of bankruptcy to a creditor, with a view of giving him the preference, and the amount due on the bills was received by him after the bankruptcy: Held, in an action of trover by the assignees to recover the bills, that the receipt of the money by the creditor was not a conversion; and, therefore, that it was necessary for them to prove a demand and refusal, before the bills became due. *Jones and Others Assignees v. Fort, T. 10 G. 4.* 764
5. In an action of trover brought to recover the value of the goods distrained, on the ground that the defendant was not plaintiff's landlord, plaintiff proved payment of rent to another person. The defendant tendered in evidence accounts rendered to him by that person to shew that he had accounted for the very rent received from the plaintiff: Held, that the accounts were not admissible in evidence, the person who rendered them being alive and capable of being a witness, and not identified in interest with the plaintiff. *Spargo v. Brown, T. 10 G. 4.* 936

TRUSTEE.

See DEED, 1. TREASURER, 1.

VENDOR AND VENDEE.

1. A. purchased of B., a hopmerchant, a library, and paid him the value.

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value. *B.*, at that time, had committed an act of bankruptcy, of which *A.* had no knowledge: Held, that the assignees could not recover the value of the books, without at least tendering the price, inasmuch as the payment made by *A.* was declared valid by the 6 G. 4. c. 16. s. 82., and in order to give full effect to that enactment, *A.* must, at least, have a lien on the books, in respect of which he had made the payment, until the assignees tendered him the sum paid. *Hill and Another Assignees v. Farnell*, H. 9 & 10 G. 4. Page 45

2. *A.* purchased goods upon credit, fraudulently intending at the time of the contract not to pay for them. *B.*, the vendor, brought assumpsit for the goods sold, before the time of the credit expired: Held, that this action was not maintainable, though the vendor might have treated the contract as a nullity, and have brought trover immediately to recover the value of the goods. *Ferguson and Another v. Carrington*, H. 9 & 10 G. 4. 59
3. At the time of making a contract of sale, the party buying the goods represented that he was buying them on account of persons resident in *Scotland*, but did not mention their names, and the seller did not enquire who they were, but afterwards debited the party who purchased the goods: Held, that the seller might afterwards sue the principals for the price. *Thompson v. Davenport* (in error), H. 9 & 10 G. 4. 78
4. Where a person who had contracted for a certain quantity of oil, to be delivered to him at a future day, at a certain price, became bankrupt before that day arrived, and obtained his cer-

tificate: Held, that he was, nevertheless, liable to an action for not accepting and paying for the oil; and that the proper measure of damages was the difference between the price which he had contracted to pay for the oil, and the market price at the time when the contract was broken. *Boorman v. Nash*, H. 9 & 10 G. 4. Page 145

5. The 47 G. 3. c. 68. recites, that the several acts then in force for regulating the vend and delivery of coals had been found insufficient to prevent the commission of frauds in the vend and delivery of such coals, and that it would tend greatly to facilitate the execution of the purposes intended by the said acts if the same were repealed, and further and better provisions made for those purposes; and then, by section 113. enacts, that the vendor of coals, sold and sent as and for wharf measure from any ship, &c., or from any wharf, &c., and to be delivered to the purchaser thereof from any cart, &c., shall deliver a printed ticket, and the carman, or driver, shall deliver the same to the purchaser or his servants before any part of the coals shall be delivered therefrom. It then gives the form of the vendor's ticket, which is to contain the number of sacks, *the name of the coals sent*, &c., the name of the vendor, and the name of the labouring meter; and it subjects any vendor of coals who shall not deliver such ticket, to a penalty of 20*l.*: Held, that this act made it imperative on the vendor of coals to deliver a vendor's ticket signed by the meter, and that the act having been passed to protect the buyer against the frauds of the seller, a vendor of coals, who had delivered

- ed a vendor's ticket to the purchaser, which was not signed by the meter, could not recover the price of the coals from such purchaser. *Little v. Poole*, H. 9 & 10 G. 4. Page 192
6. By a contract for the sale of cinq foin seed, the vendor warranted it to be good new growing seed. Soon after the sale, the buyer was told that it did not correspond with the warranty; and he afterwards sowed part, and sold the residue: Held, that in answer to an action by the seller to recover the price of the seed, it was competent to the buyer to shew that it did not correspond with the warranty. *Poulton v. Lattimore*, H. 9 & 10 G. 4. 259
7. *A.* having two pipes of wine lying in a bonded warehouse, in the name of *B.*, who had given bond for the duties, sold them to *C.*, and gave him a delivery order; and it was, at the same time, agreed that *C.* should pay the duties. When they became payable, *B.* was called upon and paid them, and took away the wine to his own cellar. *A.* repaid the amount of duties to *B.*; *C.* never required *B.* to transfer the wine to his name, but he afterwards took away one pipe, and was charged with and paid warehouse rent to *B.* *C.* afterwards became bankrupt, and his assignees demanded the other pipe: Held, that *B.*, at *A.*'s request, was entitled to keep it until the duties were repaid. *Winks and Another Assignees of White v. Hassall*, E. 10 G. 4. 372
8. Where, by a contract of sale, the vendor agreed to deliver 250 bushels of wheat within a specific time, and delivered part, but not the residue: Held, that he might, after the time mentioned in the contract had expired, recover from the purchaser the value of the wheat delivered to and retained by him. *Oxendale v. Weiserell*, E. 10 G. 4. Page 386
9. *A.* being the owner of trees growing on his land, verbally agreed with *B.*, while they were standing, to sell him the timber at so much per foot. *B.* afterwards offered to sell the butts of the trees to a third person, and said he would convert the tops into building stuff. *A.* afterwards, by letter, required *B.* to pay for the timber which he (*B.*) had bought of him. *B.* wrote a letter in answer, stating that he had bought the timber, but that he had bought it to be sound and good, and that it was not so: Held, first, that the contract was not a contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning the same, within the meaning of the 4th section of the statute of frauds; but that it was a contract for the sale of goods, wares, and merchandise, within the 17th section.
- Secondly, that as the purchaser did not, in his letter, recognise the absolute contract described in the vendor's letter but stated a conditional one as to quality, there was no note in writing of the bargain to satisfy the statute of frauds.
- Thirdly, that there had been no part acceptance or actual receipt of the goods to satisfy the statute, inasmuch as there was nothing to shew that the purchaser had divested himself of his right to object to the quality of the goods, or that the seller had lost his lien for the price. *Smith v. Surman*, T. 10 G. 4. 561
- The assignees of *A.* proposed to sell to *B.* a piece of land with all faults

faults and defects. Before any conveyance was executed, the latter asked the assignees whether any rent had ever been paid for the land? The former replied, none had been paid by the bankrupt, or by any person under whom he claimed: in fact, rent had been paid by the person who had sold the land to the bankrupt. That person having recovered possession of the land, it was held in an action brought against the assignees to recover back the purchase-money, that it was properly left to the jury to say, whether the assignees, at the time when they represented that no rent had been paid, *bonâ fide* believed that to be true; and the jury having found that they did, it was held, that the plaintiff was not entitled to recover back the purchase-money. *Early v. Garret and Another*, T. 10 G. 4. Page 928

VESTRY.

See MANDAMUS, 2.

WARDMOTE.

See CORPORATION, 1.

WARRANTY.

See VENDOR AND VENDEE, 6.

WARRANT OF COMMITMENT.

See BANKRUPT, 3.

WAY, RIGHT OF.

See TRESPASS, 4.

WITNESS.

See EVIDENCE, 12, 13. 21.

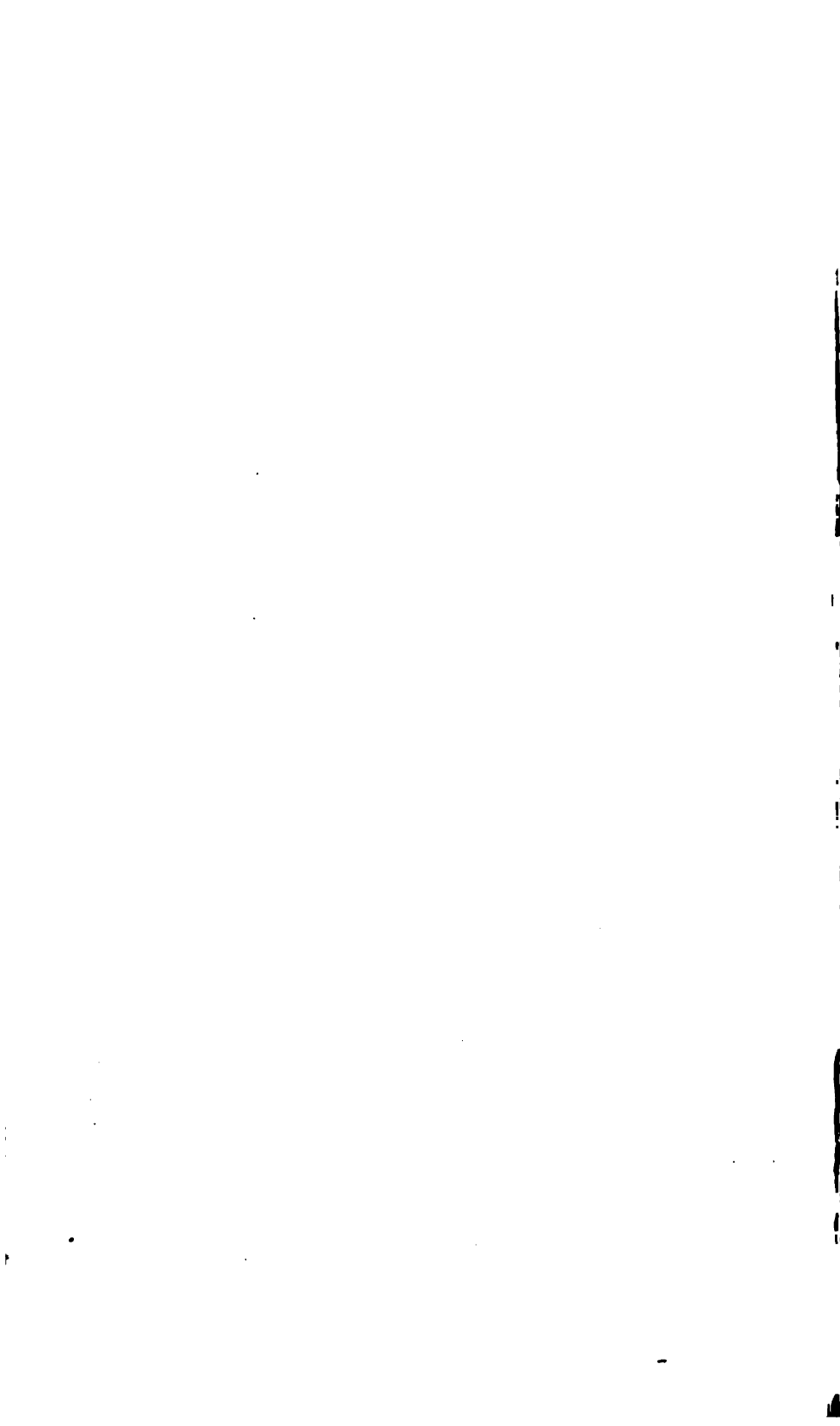
WORK AND LABOUR.

See ASSUMPSIT, 2.

WRIT DE CONTUMACE CAPIENDO.

See PRACTICE, 1.

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